TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 458.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED JULY 29, 1919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 458.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

INDEX.

	Original.	Print.
Indictment	2	1
Demurrer to indictment	3	2
Opinion of the court, Rose, J.	8	5
Order of court sustaining demurrer to indictment	11	6
Judgment	12	7
Petition for a writ of error	13	7
Order allowing writ of error	13	8
Assignment of errors	15	8
Stipulation of counsel as to making up transcript of record	15½	9
Writ of error	16	9
Citation	17	10
Order to transmit record	18	11
Clerk's certificate	18	11

1 UNITED STATES OF AMERICA,

District of Maryland, to wit:

At a district court of the United States for the District of Maryland, begun and held in the city of Baltimore on the first Tuesday in June (Being the 3rd day of the same month), in the year of our Lord one thousand nine hundred and nineteen.

Present: The Honorable John C. Rose, judge Maryland district; Samuel K. Dennis, Esq., attorney; William W. Stockham, Esq., marshal; Arthur L. Spamer, clerk.

Among other were the following proceedings, to wit:

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED, a corporation. | Criminal Docket. No. 2376.

Be it remembered, that heretofore, to wit, at a District Court of the United States for the District of Maryland, begun and held on the first Tuesday of June, 1919, George A. Colston, Alfred S. Day, John G. Crane, Louis H. Kruger, Clarence H. Smith, George R. Curtis, Samuel J. Braun, William H. Ashley, John V. Murphy, Richard J. Bloxham, William B. Cassell, Charles A. Euker, William E. Hearn, Charles F. Weyforth, Albert Gibson, William Christian, Gifford E. Blaylock, and Frederick L. Young, good and lawful men of the district aforesaid, who being impaneled, sworn, and charged to inquire for the United States of America for the body of the district aforesaid, having withdrawn from the bar of the court here, afterwards, to wit, on the 11th day of June one thousand nine hundred and nineteen, present to the court here the following indictment, to wit:

2 *Indictment.*

Filed June 11, 1919.

In the District Court of the United States for the district of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED, a corporation.

The grand inquest of the United States of America, in and for the district of Maryland, inquiring for the body of said district, do on their oath present that the Standard Brewery, Incorporated, a body corporate, duly incorporated, late of said district, heretofore, to wit, on the fourth day of June, in the year of our Lord nineteen hundred and nineteen, at Baltimore, in the State of Maryland and district aforesaid, did unlawfully use certain grains, cereals, fruit, and other food products, to wit, one hundred and ninety-five bushels of malt and one hundred and sixty pounds of hops and two thousand

pounds of grits in the manufacture and production of a large quantity of beer, to wit, two hundred and fifty barrels of beer for beverage purposes, which said beer so manufactured and produced as aforesaid then and there contained as much as one-half of one per cent of alcohol by both weight and volume; contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States.

SAMUEL K. DENNIS,
United States Attorney.

Act November 21, 1918, sec. 4.
Which said indictment is thus endorsed:
A true bill,

GEORGE A. COLSTON,
Foreman.

June 11th, 1919.
Witness:
CARL BROHMEYER.

3 And thereafter, the said Standard Brewery, Incorporated, a corporation, on the 20th day of June, 1919, filed the following demurrer to the said indictment, to wit:

Demurrer to indictment.

Filed June 20th, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED.

Demurrer.

Standard Brewery, Incorporated, the defendant herein, by its attorneys, demurs to the indictment herein and says that the same is bad in substance and insufficient in law.

And for grounds of said demurrer the defendant says:

1. That said indictment fails to allege the doing of anything or the commission of any act which is forbidden by or contrary to any law or statute of the United States.

2. Said indictment fails to allege sufficient facts to constitute a violation of any law or statute of the United States.

3. No law or statute of the United States forbids or makes unlawful or did forbid or make unlawful on June 4th, 1919, the use of grains or other food products, as alleged in the indictment, in the manufacture or production of beer for beverage purposes containing

as much as one-half of one per cent of alcohol by both weight and volume.

4 4. The act or thing charged in the indictment is not forbidden or made unlawful by any law or statute of the United States unless the beer so produced is intoxicating, and the indictment fails to allege that the beer so made was in fact intoxicating.

5. The act of Congress of the United States approved November 21st, 1918, a violation of which is charged in the indictment, relates only to beer which is in fact intoxicating, and the indictment fails to allege that the beer manufactured was in fact intoxicating.

6. The aforesaid act of Congress does not make unlawful, as charged in the indictment, the use of food products in the manufacture of beer for beverage purposes "containing as much as one-half of one per cent of alcohol both by weight and volume"; it makes no reference to the percentage of alcohol contained, nor does it even refer to the presence of alcohol, but makes the test solely whether the beer so made is or is not in fact intoxicating.

7. The aforesaid act of Congress is, so far as it may be construed to forbid the use on June 4th, 1919, of food products in the manufacture of beer for beverage purposes, unconstitutional and void, in that Congress had at the time of the passage of the act no power to forbid such use or manufacture unless the same was necessary as a "war measure," for the public security, and on June 4th, 1919, no war affecting the United States was in progress nor did any public necessity or emergency exist requiring or justifying such prohibition.

8. The aforesaid act of Congress relates, so far as it prohibits the use of food products in the manufacture of beer for beverage purposes, only to beer of the kind commonly supposed or understood to be intoxicating beer, and beer containing as small a percentage

5 of alcohol as that charged in the indictment, to wit, one-half of one per cent both by weight and volume, is not commonly supposed or understood to be intoxicating beer, and is therefore not the kind of beer referred to in the act in question.

9. The aforesaid act of Congress of the United States approved November 21st, 1918, provides that nothing therein shall be construed to interfere with the power conferred upon the President under section 15 of the food-control act of August 10th, 1917. In pursuance of the power conferred upon him by said food-control act the President did by his proclamations issued January 30th, 1919, and March 4th, 1919, permit the use of grain and food products in the manufacture of malt beverages, which are not in fact intoxicating, and said act of November 21st, 1918, therefore does not prohibit and has not prohibited since the issuance of said proclamations, the use of such grain or food products in the manufacture of beer or other malt liquor which is not in fact intoxicating.

10. The indictment undertakes improperly and without justification in law to define the kind of beer referred to in the act of Congress of the United States approved November 21st, 1918, whose

violation is charged in the indictment. The attempted definition "beer containing as much as one-half of one per cent of alcol both by weight and volume." No such definition is contained in intended by or reasonably to be construed to be implied in the in question, but said definition of "beer" as used in the said indi ment is based solely on the test or standard applied in laws or re lations relating solely to matters of revenue or taxation.

11. The aforesaid act of Congress approved November 21st, 19 applies only to "beer," wines, or other intoxicating malt or vin liquors for beverage purposes." The indictment fails to allege fa
from which it may be reasonably understood or assumed th
6 the beer referred to in the indictment was "an intoxicati
liquor," and therefore fails to charge facts constituting a v lation of the act.

12. The aforesaid act of Congress declared the "beer" there referred to to be "an intoxicating malt liquor," and hence refers, a was intended to refer, only to the kind of beer which is "intoxicati beer," and the kind of beer set forth in the indictment, to wit, th containing "as much as one-half of one per cent of alcohol," n only is not alleged and can not be assumed to be "intoxicating," b in fact is and must be judicially recognized to be nonintoxicati and therefore is not the kind of beer referred to or prohibited by t act in question.

13. The aforesaid act of Congress, in so far as it forbids the u after May 1st, 1919, of food products in the manufacture for bevera purposes of "beer, wine, and other intoxicating malt or vino liquors," does not purport to be a food-conservation statute, but measure designed to conserve the man power of the Nation by p venting the use of intoxicants, and the indictment fails to allege a facts showing that the defendant manufactured for beverage pu poses any intoxicating beer or intoxicant of any kind, or that t "beer" so made by it was or is of the kind referred to and intend to be reached by said act.

14. The aforesaid act of Congress approved November 21st, 19 in so far as it purports to apply to the production, manufacture, sale of beer, wine, or other intoxicating malt or vinous liquor beverage purposes is unconstitutional and void because in excess and unauthorized by any power delegated to or vested in the C gress or any department or officer thereof under and by virtue of t Constitution of the United States.

7 15. And for other grounds to be assigned at the hearing

ELIHU ROOT,
WM. D. GUTHRIE,
W. L. RAWLS,
RANDOLPH BARTON, JR.,
WM. L. MARBURY,
Attys. for Defendant

Which said demurrer to the indictment the court sustained, and thereupon, on the 1st day of July, 1919, filed the following opinion, to wit:

8 *Opinion of the court.*

Filed July 1, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA

vs.

STANDARD BREWERY.

ROSE, *District Judge:*

According to the dictionary beer is an alcoholic beverage resulting from the fermentation of cereals or other starchy substances. To be beer it must contain alcohol. If it contains so little that nobody wants it because of the alcohol in it, it is not beer from any practical standpoint. The Internal Revenue Department, years ago, had to deal with this question. The statute taxed all fermented liquors. When was a liquor fermented? The department answered that fermentation had not taken place enough to make it within the taxing meaning of the words "a fermented beverage" unless it resulted in an alcoholic content of at least one-half of one per cent. If Congress had forbidden anyone to sell beer or other fermented liquor, beer containing one-half of one per cent or more of alcohol would have been covered by the statute. Congress has not used those words. It has used others which may mean that it intended to forbid the making and sale of nothing which is not intoxicating. I must confess that my mind has a tendency towards what might be called a historical rather than the more or less artificial legal construction of such an enactment. I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what

9 they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I can not now say that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the second circuit have each expressed the opinion

that it has no relation to anything which is not intoxicating. I have profound respect for their opinions, not only because they are judges but because they are usually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even although it may not be the one that I should personally have put on it had I known nothing of their views. It is, moreover, very important that this act shall be uniformly construed and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and conveniently corrected than the opposite mistake. I shall therefore sustain the demurrer. What is the practical effect of so doing? It is merely this, until the Supreme Court decides differently prosecutions are not likely to be instituted in this district against any man for selling any fermented or vinous liquor which is not intoxicating. If he sells any that is intoxicating he breaks the statute and can, and I suppose will, be immediately prosecuted. It may be well for all to bear in mind that I have not decided, nor, so far as I know, has anyone as yet decided, that two and three-quarter per cent beer is not intoxicating. All that has been determined on that question is that the affidavits presented by the brewers in New York that it is not were strong enough to induce the United States Court to
10 restrain the collector of internal revenue from refusing to sell stamps, etc., to the brewers of that beverage. If anyone makes or if anyone sells it, and the jury shall determine that what he made or sold is intoxicating, he will be liable to the penalty, and is liable, I take it, in New York, as anywhere else. Moreover, if the Supreme Court shall ultimately decide that the Government's contention is right, anyone who now sells any beer containing one-half per cent or more of alcohol will be then subject to indictment for everything he has done in that respect since July first.

I do not know that anyone is forced to sell such beer or to make it, and if he takes the chance, and sells it to make money by so doing, and the Supreme Court concludes that he has broken the statute, he has no claim to special leniency of treatment.

And thereupon the court entered the following order sustaining the said demurrer on the 2nd day of July, 1919, to wit:

11 *Order of court sustaining demurrer to indictment.*

Filed July 2, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INCORPORATED.

The demurrer to the indictment in the above entitled case coming on to be heard, and having been fully argued by counsel for the

nited States and for the Standard Brewery, Incorporated, it is reby adjudged, ordered, and decreed by the District Court of the nited States for the District of Maryland, this second day of July, 919, that the demurrer be, and the same is hereby, sustained, be- use the indictment found in said cause alleges no facts sufficient nder the true construction of the act of Congress approved Novem- er 21, 1918, section 4, chapter 212, to constitute an offense against he United States

JOHN C. ROSE,
District Judge.

2 *Judgment.*

Whereupon all and singular the premises being seen, and by the court here fully understood for that it appears to the court here that the said indictment and the matters therein contained are not sufficient in law to compel the said Standard Brewery, Incorporated, a corporation, to answer thereto, and that no process upon the said indictment ought by the law of the land to be made against it; therefore it is considered by the court here that the said Standard Brewery, Incorporated, a corporation, be dismissed and discharged of the said indictment, and that it go thereof without day.

13 *Petition of United States for a writ of error to the Supreme Court of the United States and order of court granting writ of error.*

Filed July 2, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA, PLAINTIFF in error, *vs.* STANDARD BREWERY, INCORPORATED, defendant in error.	At Law. Petition for writ of error.

And now comes the United States of America, the plaintiff in error herein, by Samuel K. Dennis, United States attorney, and says:

That on or about the second day of July, in the year 1919, the District Court entered a judgment herein in favor of the defendant and against the plaintiff, in which judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the

record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

SAMUEL K. DENNIS,
U. S. Attorney,
JAMES A. LATANE,
Asst. U. S. Atty.,
Attorneys for Plaintiff in Error.

14 Upon the foregoing petition, it is ordered by the District Court of the United States for the District of Maryland, this 2nd day of July, 1919, that a writ error from the Supreme Court of the United States, be and the same is hereby allowed as prayed.

JOHN C. ROSE,
U. S. District Judge.

15 *Assignment of errors.*

Filed July 2, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *vs.* THE STANDARD BREWERY, INCORPORATED, defendant in error.	Assignments of errors.

The plaintiff in this action, in connection with his petition for writ of error, makes the following assignment of errors, which he avers exists:

First: The court erred in sustaining the demurrer to the indictment, and holding and deciding that the indictment did not state facts sufficient to constitute an offense against the United States under the true construction of the provisions of the act of November 21, 1918, section four, 2nd session, 65th Congress, chapter 212.

Second: That the court erred in sustaining the demurrer of the defendant in error to the indictment, on the ground that under the true construction of the said act the indictment charges no offense against the United States.

Third: That the court erred in rendering judgment against this plaintiff in error upon sustaining the demurrer of the defendant in error.

Wherefore the plaintiff prays that said judgment be reversed.

SAMUEL K. DENNIS,
United States Attorney.
JAMES A. LATANE,
Asst. U. S. Atty.
Attorneys for Plaintiff in Error.

15 *Stipulation of counsel as to making up transcript of record on appeal.*

Filed July 15th, 1919.

In the District Court of the United States for the District of Maryland.

UNITED STATES OF AMERICA
vs.
STANDARD BREWERY, INC. } No. 2376 Criminal Docket.

It is hereby stipulated and agreed by and between the parties to the above entitled case, that the transcript of record on the appeal by the United States to the Supreme Court of the United States, shall consist of the following, viz:

1. Indictment.
2. Demurrer to indictment.
3. Opinion of the court.
4. Order of court sustaining demurrer to indictment.
5. Petition of United States for writ of error and order of court thereon.
6. Assignment of errors.
7. Writ of error.
8. Citation.
9. Order to transmit record.
10. Clerk's certificate.

SAM'L. K. DENNIS,
U. S. Attorney.
W. L. MARBURY,
W. L. RAWLS,
RANDOLPH BARTON, JR.,
Attorneys for Defendant.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the District Court of the United States for the District of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America and Standard Brewery, Incorporated, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears. We being willing that error, in any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly

and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of July, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] ARTHUR L. SPAMER,
Clerk of the District Court of the United States
for the District of Maryland.

Allowed by
JOHN C. ROSE,
U. S. District Judge.

17 UNITED STATES OF AMERICA, *ss:*

To Standard Brewery, Incorporated, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Maryland, wherein United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this second day of July, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] JOHN C. ROSE,
U. S. District Judge.

Attest:

ARTHUR L. SPAMER,
Clerk District Court of the United States
for the District of Maryland.

Service of the within citation acknowledged this 2d day of July, 1919.

W. S. MARBURY,
Attorney for Standard Brewery (Incorporated),
Defendant in Error.

Order to transmit record.

n pursuance of the writ of error aforesaid, and according to the
tute in such case made and provided, and of the Order of Court
e, a record of the judgment aforesaid, with all things thereunto
ating, together with the said writ of error annexed, is hereby
nsmitted to the said Supreme Court of the United States, ac-
dingly.
Teste:

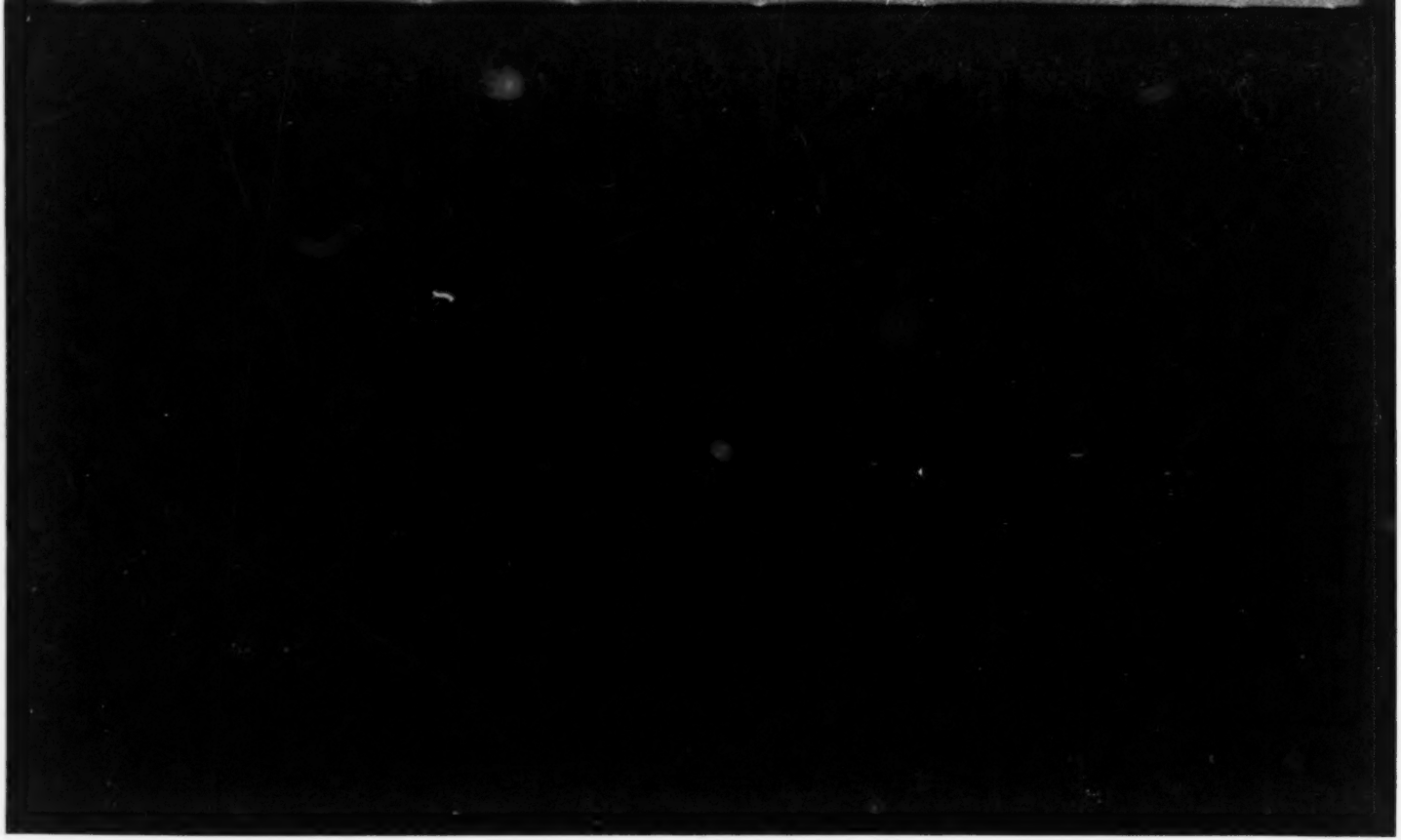
ARTHUR L. SPAMER,
Clerk.

Clerk's certificate.

ITED STATES OF AMERICA,
District of Maryland, to wit:
I, Arthur L. Spamer, clerk of the District Court of the United
ates for the District of Maryland, do hereby certify that the fore-
ing is a true transcript of the record and proceedings of the said
strict Court, together with all things thereunto relating made up
accordance with the stipulation of counsel, incorporated therein,
the therein entitled cause.
In testimony whereof, I hereunto set my hand and affix the seal
said District Court, this 16th day of July, 1919.
[SEAL.] ARTHUR L. SPAMER,
Clerk.

(Endorsement on cover:) File No. 27213, Maryland D. C. U. S.
erm No. 458. The United States of America, plaintiff in error, *vs.*
andard Brewery, Incorporated. Filed July 22d, 1919. File No.
213.

○



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, Plaintiff in error,
v.
STANDARD BREWERY, INCORPORATED.
No. 458.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, respectfully moves the advancement of the above-entitled cause for early hearing during the present term.

The case involves the construction of that portion of the Act of November 21, 1918, 40 Stat. 1045, forbidding the use after May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, of grains or other food products in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. The indictment alleged the use of certain grain and other food products in the manufacture of beer containing "as much as one-half

138055—19

of one per cent of alcohol by both weight and volume." A demurrer was interposed thereto and sustained on the ground that beer containing such percentage of alcohol was not an intoxicating liquor within the meaning of the statute.

The question involved is one of general public importance. Numerous cases are pending in the United States courts which would be controlled by the Court's decision herein. Other Federal courts have passed upon the matter and conflicting decisions have resulted. It is important, therefore, that an early decision may be had in the instant case.

Notice of this motion has been served on opposing counsel.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.

○

FILED
DEC 11 1920
JAMES D. MAHER,
CLERK.

NO. 468

In the Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF AMICUS CURIAE FOR THE UNITED STATES

WATSON D. WILLSON,
ANDREW WILSON,
Attorneys Amicus Curiæ.

PRESS OF BYRON S. ADAMS, DC.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff in Error
v.
STANDARD BREWERY,
INCORPORATED.

No. 458.

In Error to the District Court of the United States for the District of Maryland.

BRIEF AMICUS CURIAE FOR THE UNITED STATES on construction of War Prohibition Act.

Agreeable to the permission of the Court this brief is filed as Amicus Curiae in the hope that some of the authorities cited and reasons given may prove helpful in determining what is the proper construction to be placed upon the War Prohibition Act.

POINTS AND AUTHORITIES.

I.

The War Prohibition Act prohibits beer and wine containing two and three-fourths per cent alcohol by weight and three and three-tenths per cent alcohol by volume, regardless of their intoxicating qualities. (War Pro-

hibition Act passed November 21, 1918, Sec. 15), *U. S.* v. *Cohn*, 52 S. W. Rep. 438; *LaFolllette* v. *Murray*, 81, Ohio State 474, 91 N. W. Rep. 294; *State* v. *Walder*, 83 Ohio State 68; *State v. Williams*, 11 S. D. 64; *State* v. *Ely*, 22 S. D. 487.

II.

Similar statutes enacted by Congress and State legislatures have been construed to include all beer and wine without reference to their intoxicating quality. *U. S.* v. *Cohn*, 52 S. W. Rep. 438; *LaFollette* v. *Murray*, 81 Ohio State 474; *State* v. *Williams*, 75 N. W. 815.

III.

The uniform policy of Congress has been to prohibit beer and wine without reference to the intoxicating quality of such liquors. Army Canteen law. 31 Sta. L. 758; law against sale of liquor to Indians, 29 Sta. L. 506, etc.

IV.

Beer amendments offered to War Prohibition Act, District of Columbia, and defeated.

V.

Rules of construction to be applied in determining what is included in the act; that the act may be enforced; that it may carry out the purpose of the act; the conditions under which it was enacted and the evil to be remedied.

DOES THE PHRASE "OTHER INTOXICATING MALT OR VINOUS LIQUOR" REQUIRE BEER AND WINE TO BE INTOXICATING TO COME WITHIN THE PROVISIONS OF THE LAW?

It is contended that the phrase "other intoxicating malt or vinous liquor" limits the word "beer and wine" and unless beer and wine are intoxicating in fact, they do not come within the provisions of the law. This construction is not tenable for the following reasons: The word "no" before the phrase, "grain, cereals, etc.," and before the term "beer, wine, etc.," makes clear the intention of Congress to place no limitation upon the prohibition. If Congress had intended that only intoxicating beer and intoxicating wine was prohibited after July 1, they would have stated that intoxicating liquors were prohibited and added nothing further, but Congress intended and did go further than that and included beer and wine whether intoxicating or not. Every member of Congress knew that the courts had repeatedly held that a legislative body may define what is intoxicating liquor and include within the definition specific kinds of liquors that would not be classed as intoxicants if they were within the definition. In the face of these decisions Congress deliberately specified beer and wine as within the prohibition.

To construe this act to permit the sale of beer and wine would be a direct contradiction of the plain terms of the statute. If Congress did not intend to prohibit every kind of beer and wine, why did they use the language "No beer, wine, etc.," shall be sold after June 30th? When beer and wine have been singled out and specified in a legislative act the uniform rule of construction has been to include all kinds of beer and wine without reference to the percentage of alcohol contained in them.

CONSTRUCTION OF SIMILAR STATUTES.

Section 8, providing punishment for the sale of liquor to the Indians, Volume 3, Federal Statutes Annotated, page 917, reads as follows: "That any person whether an Indian or otherwise who shall in said territory manufacture, sell, give away, or in any manner or by any means furnish to anyone either for himself or another ANY VINOUS, MALT OR FERMENTED LIQUORS OR ANY OTHER INTOXICATING DRINKS OF ANY KIND WHATEVER, etc." This statute has been in operation for many years and has been construed by the Federal Court to include non-intoxicating malt liquor. In the case of *United States* v. *Cohn*, decided in 1899, 2 Indian Territory, 474, 52 S. W. Rep. 438, it was held that the sale of non-intoxicating malt liquor was a violation of this act, notwithstanding the use of the word "other" before the words "intoxicating drink." This decision is reinforced by the language in this statute which says "no beer, wine, etc." Inasmuch as Congress has the right to define intoxicating liquor and stated specifically that no beer, wine, etc., should be sold, it was clearly intended that all beer and wine, whether intoxicating or not, should come within the provisions of the statute. The word "other" in a statute is sometimes construed to limit the provision last named to the same class as those first named. Such a construction in this case would mean only that all malt and vinous liquors which are not wine or beer must be intoxicating liquor. There may be malt or vinous liquors that are not beer and wine which come within the classification "malt and vinous liquors," but this will not in any way permit the sale of that which is beer and wine as contemplated by Congress. This same language has been

interpreted by the Supreme Court of Ohio in determining the liability of a liquor dealer for the payment of the liquor tax. In 1910 the liquor tax law in Ohio read as follows: "Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed, etc., a tax in the sum of one thousand ($1,000) dollars. The Supreme Court of Ohio construed this statute in the case of *La Follette* v. *Murray*, 81 Ohio State, 474; 91, N. E. Rep. 294. The court in its decision called attention to the fact that the law had been amended and it formerly read "any intoxicating liquor," but as it then stood it read "spirituous, vinous, malt or other intoxicating liquor." Calling attention to the fact that it was contended under the former provision that the word "malt" qualified the words "intoxicating liquors" and not the word "liquor." The court said: "The decision was not grounded upon the use of the word "any," but if the Legislature intended such an important change as the exemption of non-intoxicating vinous and malt liquors from the tax, it would have clearly expressed its intention. We must conclude that the meaning of the section was not changed by the substitution of the word "other" for the word "any." The court held that the sale or traffic in malt liquors, whether intoxicating or not, came within the provisions of the law. Following this decision the Legislature in Ohio passed a local option law prohibiting in dry territory intoxicating liquor under the following definition: "The phrase 'intoxicating liquors' as used in this act shall be construed to mean any distilled, malt, vinous, or any intoxicating liquor whatever." The court discussed somewhat at length the former decisions where the words "other intoxicating liquors" and "any intoxi-

cating liquor" followed specific terms. This case was very bitterly contested, as it involved the enforcement of a local option law which was effective in most of the counties. The undersigned presented the argument in this case. It was decided against the construction for which we contended in the Circuit Court and the strongest decision was written in harmony with that theory of the law that we have ever read. The case was taken to the Supreme Court and that court reversed the Circuit Court and held that the phrase "intoxicating liquor" as used in the local option law should be construed to mean any distilled, malt, or vinous liquor, whether it is intoxicating or not. In discussing the near-beer phase of the question, the court said:

"The legislative fiat has gone forth that malt liquor is intoxicating within the meaning of the act, and that is the end of it. If the law is wrong, it is for the Legislature, and not the court, to correct it, but it was enacted no doubt to cover such evasions as have been tried in many localities."

Two cases from South Dakota are in point.

The case of *State* v. *Williams* 11 S. D. 64—75 N. W. 815, construes language similar to that found in the War Prohibition Statute. In the use of the term "or other intoxicating liquors" following the designation of "spirituous, vinous, malt, termed fermented," clearly indicate in our opinion that it was the intention of the legislation to class all the liquors mentioned as intoxicating."

See also *State* v. *Ely*, 22 S. D. 487.

Sec. 2834 requires a license to engage in the business of selling any spirituous, vinous, malt, brewed or other intoxicating liquors.

Held "upon showing that the liquors sold were of the class named, the state need not prove that they were intoxicating."

If this construction is placed upon a criminal law relating to intoxicating liquors, there is good reason for apply ing the construction even more rigidly in a law which was to conserve the food, fuel, transportation facilities and man-power for the support of the Army and the maintenance of the Navy in a war emergency.

The application of the rule of ejusdom generis will not avail opposing counsel in this case. At best it is only a rule of construction to aid in arriving at the real legislative intent. It has never been a cast-iron rule, nor does it override all other rules of construction. It is never applied to defeat the real purpose of the statute such as may be gathered from the whole instrument.

See *U. S.* v. *Mescal* 215, U. S. 26. Fed.

See also in re Stege (C. C. A.) 116-344:

"Counsel for defendant invokes the rule of ejusdom generis, and says that the words 'Any other person' are confined by the earlier specifications of the section, to those who are engaged in the carriage of the liquors either as principal or employee. The rule invoked is not much in favor at the present time. Stroud's Judicial Dictionary, after a full review of the English authorities on the subject, says: 'It may be doubted whether the rule is of much practical value at the present day.' *U. S.* v. *First Nat. Bank of Anamoose*, 190 Fed. 336. See Sutherland Stat. Construction, Vol. 2, Sec. 437–439. Black Interpretation of Law, page 215.

In this act Congress clearly intended to prevent the use of any grain or food products from being made into beer during the period named and to prevent the sale of beer and wine under the prohibition act. It is inconceivable

that Congress would enact a law to save food and leave in it a provision that would permit the waste of food material by the making of beer which contains less than two and three-quarters per cent alcohol. No State or Federal law contains such a provision. Practically all of them prohibit all distilled, malt and vinous liquors. Some of them prohibit all alcoholic liquors and practically all of the rest prohibit intoxicating liquors containing more than one-half of one per cent alcohol To construe this law to permit that which every prohibition law in operation prevents would be an unwarranted construction.

THE UNIFORM POLICY OF CONGRESS HAS BEEN TO PROHIBIT BEER AND WINE WITH OTHER INTOXICATING LIQUORS.

The uniform policy of Congress has been to specifically prohibit beer and wine along with other intoxicating liquors. This policy was made prominent when the sale of liquor was prohibited in the Army Canteen. Nothing but beer and wine was served in the Post Exchange or Canteen. The Army Canteen Law, Section 38, 31 Stat. L. 758, provides "The sale of or dealing in beer, wine or other intoxicating liquors by any person in any Post Exchange or Canteen * * * is hereby prohibited." See also the Prohibition Enforcement Act for Indian Territory, January 30, 1897, Chapter 109, 29 Stat. L. 506, provides that any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquor, including beer, wine, or any other ardent or intoxicating liquor," etc., * * * shall be punished by imprisonment. See also Wilson Law regulating Interstate Commerce which provides "that all fermented, distilled or other intoxicating liquors, etc." See 238 of the Code relating

to c. o. d. packages, which provides that "who shall unknowingly deliver or cause to be delivered * * * to any person under a fictitious name any spirituous, vinous, malted, fermented, or other intoxicating liquor," etc. Beer is a malted liquor and wine is a vinous liquor and they were included in the prohibition. In several of the acts beer and wine were specifically mentioned just as they were in the War Prohibition Act. In nearly every prohibition measure that has come before Congress the question has been raised by friends of beer and wine and in every instance Congress has voted against such exemption and on the other hand specifically included beer and wine, either by name or under the term "malt, vinous, or fermented liquors." The following from the Congressional Record shows the uniform policy of Congress in including beer and wine in all prohibition measures.

BEER AMENDMENTS TO NATIONAL PROHIBITION.

Vol. 55, part 6, Congressional Record, Sixty-fifth Congress, pages 5663 and 5664, August 1, 1917, Mr. Phelan offered amendment which was recorded on page 5659 and reads as follows:

Article—.

Section 1. The manufacture, sale, or transportation of distilled spirituous liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited: Provided, That this article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, on or before the first day of July, A. D. 1927.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

This amendment eliminated the words "intoxicating liquors" from Article 18, as it was finally adopted, and substituted "distilled spirituous liquors." This was done to make possible the sale of beer and wine. The amendment was defeated by a viva voce vote. See page 5664. The record is made on the same page that Mr. Newlands offered the same amendment as follows:

Mr. Newlands: I move that the joint resolution be amended by substituting the word distilled for the word intoxicating, in line 10, page 1, so that the article will read as follows: Section 1. The manufacture, sale or transportation of distilled liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The yea and nay vote on the amendment to exclude beer and wine by Mr. Phelan was rejected by a vote of 22 yeas and 57 nays. See page 5664.

BEER AMENDMENT TO WAR PROHIBITION.

On page 4181 the following amendment was offered by Mr. Church:

Amend section 13, by adding at the end thereof the following: "Provided, Nothing herein contained shall prohibit the manufacture of wine containing no grain products."

Another amendment was offered and was pending at the same time by Mr. Sabath as follows: (p. 4181.)

Amendment by Mr. Sabath: Page 15, after the word "both," in line 24, insert:

"Provided, That nothing contained in this section shall prohibit the manufacture or use of wines or beer."

The vote was taken on Mr. Sabath's amendment and the amendment lost. On a division demanded by Mr.

Sabath there were 88 yeas and 130 nays. Mr. Parker of New Jersey then moved to strike out all of section 13 which related to the War Prohibition matter. The Chair announced that the nays appeared to have it. On a division demanded by Mr. Parker there were 119 ayes and 127 nays. On a yea and nay vote there were 138 yeas and 152 nays.

AMENDMENT TO DISTRICT OF COLUMBIA TO EXEMPT WINE.

Congressional Record, Vol. 54, part 2, page 1060, Mr. Phelan of California offered an amendment as follows:

"Mr. President pro tempore. The secretary will read the amendment offered by the Senator of California (Mr. Phelan).

The secretary. On page 2, line 10, strike out the words 'wine, ale, porter, beer,' so that if amended it will read: 'Wherever the term "alcoholic liquors" is used in this act, it shall be deemed to include whisky, brandy, rum, ale, gin, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, all malt liquors, and all other alcoholic liquors.'

Mr. Phelan. Mr. President, it has just occurred to me during the course of this debate that, inasmuch as there is apparently wide divergence of opinion among the Senators, a compromise might be reached, whereby the good people of the District would not be denied those privileges which are enjoyed by the men and women of Europe to have at their meals, wherever they take their meals, whether it be in residence, club, or hotel, light wines or light beers, which the experience of Europe teaches us are not, in practice, intoxicating."

On page 1066 the Record shows that Mr. Phelan attempted to exclude ale, wine, beer, and porter from the District of Columbia Bill. The record is as follows:

"Mr. Vardaman. Mr. President, I rise to a point of order. The amendment has already been rejected. The Senator from California offered the amendment to the Underwood amendment striking out beer and wine (light) and he offers this amendment with that stricken out. The Senate has already acted upon the question.

"Mr. Phelan. In my previous amendment I accepted hard or fermented cider at the suggestion of the Senator from New Hampshire, and I exclude that now. So it rests now, simply on ale, wine, beer, and porter, and not hard or fermented cider—a substantial change.

"Mr. Stone. Mr. President, I address myself to the Senator from California. I was called out when he was offering his amendment. The Senator, as I recall it, voted against the referendum. How did the Senator vote?

"Mr. Phelan. The Senator from California voted for the Underwood referendum amendment with the intention, had it provided, of offering this as an alternative, so that the people of the District might vote either for all liquors or simply for wines and beers. Now, the referendum amendment having failed, although my vote was cast for it, I offer independently, as a new referendum, the amendment on the desk. It is not the same as my original amendment either in form or substance.

"Mr. Vardaman. I insist on my point of order.

"Mr. President pro tempore. The Chair understands the Senator from California offered this amendment, as in Committee of the Whole, to the Underwood amendment.

"The President pro tempore. The Chair, subject to the right of appeal by the Senator from California, will rule that the amendment is out of order, as having been offered.

"Mr. Phelan. I appeal from the decision of the Chair on the question of order. I submit that what I have now

submitted differs in substance from the original amendment.

"The President pro tempore. The question is, Shall the decision of the Chair stand as the judgment of the Senate? (Putting the question.) The ayes appear to have it. The ayes have it, and the decision of the Chair is sustained. If there is no further amendment to be proposed, the bill will be ordered to be engrossed for a third reading and read the third time. The bill was ordered to be engrossed for a third reading, and read the third time."

These illustrations might be multiplied. There never has been a vote in Congress on this issue when Congress excluded beer and wine from prohibition laws. In every instance both the discussion and the vote and the wording of the law make clear that all kinds of beer and wine are intended to be prohibited by the Federal Prohibition Acts.

RULES OF CONSTRUCTION TO BE APPLIED TO THE WAR PROHIBITION ACT.

The first well-settled rule of construction is that:

"The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the legislature, to the end that the same may be enforced.

The meaning and intention must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the legislature to express its will are adequate to the purpose and do express that will correctly." (Black on Interpretation of the Law, page 45.)

LANGUAGE.

The language in question in this case is clear, inclusive and exclusive. The statute says: "No beer, wine," etc. That is as simple and utter negation as words can frame. Beers have always differed in their alcoholic content as Congress knew, and this language forbids them all. So

determined was the Congress that there should be no mistaking its meaning that the usual language of such statutes, "beer, wine," etc.—under which less vigorous phrasing all kinds of beer and wine have long been ruled to be prohibited—was put aside and the more terse, emphatic and undebatable words "no beer" selected. The very unusualness of the phrasing may well be considered to represent conscious and deliberate effort on the part of Congress to be superlatively inclusive and emphatic. With respect to such words there can be no doubt. To argue otherwise not only bends but breaks the vehicles of intelligent intercourse. Clearly, no beer or wine can be manufactured or sold under the wording of this act.

SCOPE AND PURPOSE OF THE ACT.

A second rule of construction is stated as follows:

"Every statute is to be construed with reference to its intended scope and the purpose of the legislature in enacting it; and where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and carry out the purpose of the statute." (Black on Interpretation of the Law, page 76.)

The emphatic and inclusive phrasing heretofore noted fits perfectly the intended scope and purpose of this legislation.

The wording expresses the purpose and the purpose justified the words. Congress was herein adopting further legislation for the conservation of food, fuel and manpower. By previous legislation the administrative branch of the government had been empowered to limit the accustomed activities of individuals in ways unprecedented. Flour and sugar were sparingly and stringently allotted to each individual, and numerous other limitations placed

upon eating and drinking. The Act under consideration was an additional conservation Act, and it would be inconsistent with its clear intent to construe it as permitting the continued use of coal, grain and man-power in the manufacture of any variety of a beverage expressly forbidden by the Act as one involving waste, which waste is a basic assumption and implied delcaration of this Act and not properly a matter to be debated before this court.

THE HISTORY AND CONDITIONS UNDER WHICH THE LEGISLATION WAS PASSED SHOULD BE CONSIDERED.

"In construing a statute, the courts may recur to the history of the times when it was passed, in order to ascertain the reason for its passage as well as the meaning of its provisions." (*U. S.* v. *Union Pacific R. R. Co.*, 91 U. S. 72.)

In *Platt* v. *Union Pacific Railroad* (99 U. S., 64), it was said:

"But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the circumstances."

In *Siemons* v. *Sellers* (123 U. S., 276, 285), the court said: "No doubt, the words of the law are generally to have a controlling effect upon its construction; but the interpretation of these words is often to be sought from the surrounding circumstances and preceding history." (Page 58 of Senate Document No. 981.)

The circumstances under which this Act was passed further enforce the construction of its scope and intent for which we contend. There had been an earnest, previous effort in Congress to prohibit all alcoholic beverages. This effort had resulted in legislation prohibiting the manufac-

ture of distilled alcoholic beverages but leaving in the hands of the President the power to limit or prohibit, at his discretion, the manufacture of beer and wine. The legislation in controversy here was the fruit of public and congressional dissatisfaction that the President had not acted to the limit of the powers conferred upon him with respect to beer and wine. It was a re-exercise by Congress of its prerogatives in the case for the purpose of answering an insistent public demand that the manufacture of food material into beer and wine be also prohibited. There was presented to Congress, while the Act was pending, evidence of the increased efficiency in the shipyards located in States which prohibited all liquor. The Secretary of the Navy testified that navy yard workmen in whose vicinity liquor was sold produced less and were less efficient. Manufacturers and others presented evidence that liquor decreased the mental activities and accuracy of workers, lowered their physical strength and efficiency and destroyed the morale essential to the nation's industrial forces. Both beer and wine as well as all distilled liquors had already been prohibited in army camps and in zones about them. The far-reaching benefits of this policy every Congressman knew. The very crux of the legislative struggle which produced this law was over the prohibition of beer. The President prohibited the manufacture of beer with more than 2¾ per cent alcohol in it in his order December 21, 1917. See Exhibit F, page 39, of the Bill of Complaint. The war prohibition was enacted in November, 1918. Why should Congress prohibit what was already prohibited? Clearly it intended to prohibit that which was not included by the President. Intelligent action on the part of Congress can not be explained in any other way.

THE EVIL TO BE REMEDIED.

Another well-settled rule of construction is what was the evil to be remedied?

In the case of the *Holy Trinity* v. *United States* (143 U. S., 457–463), Mr. Justice Brewer in delivering the opinion said: "Again another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. * * * It appears also from the petitions, and in the testimony presented before the committee of Congress." (Page 58 of the Senate Document No. 981.)

The evil to be remedied was clear. Food products were being wasted in the making of beer. Man-power was being crippled by failure to speed up food production and war material. The Army was not getting full support because liquor was wasting our resources at home. The fuel supply was short and the coal producers appealed to the Government to close the liquor saloons. The public hearings on this act known as Hearings before the Committee on Agriculture and Forestry, House Resolutions 11945, are absolutely convincing in showing what was the evil to be remedied and what was the manifest purpose of the act and the construction to be placed upon it. The Chairman of the Committee said to Secretary Daniels as he appeared to testify: "We will be very glad to have your views and your experience or observation as relating to government shipyards where beer, etc., is sold and where they are not sold." See page 235, Hearings on Agriculture and Forestry. 65 Cong., 2nd Session, H. R. 11945, Secretary Daniels said:

"Now you take the question, as I say, at Mare Island. Perhaps there was no town in America where there were so many saloons in proportion to the population or where the conditions have been more wretched. The brewing interests there seemed to dominate the city government. To our appeals for some measure of cleaning up they turned a deaf ear and conditions were so deplorable that it was a crime to let them continue." * * * "My observation on that would probably be drawn from the coal fields of West Virginia, Kentucky, and other sections, where there is a larger foreign population than anywhere else. When prohibition was put into effect in West Virginia and other coal fields, the prediction was freely made that it would result in inefficiency and the foreign-born people would so protest against the taking away of what they called their liberties the mines would lose in production. But if you would submit the question to the people in that country now, it would be carried by a so much larger majroity than before that there would be no question about it. My experience in navy yards and in private yards building ships for the Navy proves this observation. * * * That is the experience everywhere. Many good men think at first it is going to make a great deal of trouble when it comes, particularly in war times, and the men say 'If I do not like it, it promotes the good of the country in carrying on the war,' opinion crystalizes in favor of temperance legislation. In my judgment we ought not during the war to use a bushel of wheat for anything except a prime necessity, whether it is drink or eating; we ought not to use a car in America for anything except to win the war. And every man employed in the industry of producing alcoholic drinks is employed in a business that is not necessary to put it at the very best. In my judgment it is the business that lessens efficiency."

The Secretary of the Navy in his testimony referred to all kinds of liquors regardless of the per cent of alcohol in them.

His testimony was very convincing and was a satisfactory answer to those who appeared before the committee asking that beer and wine be permitted to be manufactured and sold. It was pointed out on page 299 of the Committee Hearing, that there are 65,000 handling and selling it. This was a waste of energy needed in useful industry. It was pointed out on page 300 that the use of alcoholic liquors increased poverty, crime, vice and that there are 600,000 men rejected from the first draft for physical defects and that large numbers of these were caused by the use of drink. General Pershing's testimony was presented on page 189 in the following terms:

"From the military point of view we cannot tolerate alcohol among our soldiers."

The testimony of ship-builders and managers of the shipyards was presented showing that war activities were carried on more successfully where all kinds of liquor was prohibited. There was not the slightest intimation on the part of any individual on either side of the controversy that beer could be sold and manufactured containing 3.3 per cent alcohol by volume or any malt beer under the provisions of this Act. Its purpose was clear. The wording and language of the Act is definite. No one called into question the language of it at the time of its enactment. Opposing counsel cannot show a single line in the debates or at the hearing that sustains the contention which they make. If they wanted to sell beer under the war prohibition act, they should have frankly asked for and secured such an amendment, in fact such an amendment was offered in the House on the original War Prohibition Act and was defeated. It was offered in the Senate and was defeated. This construction for which

opposing counsel contend has been before Congress repeatedly in amendments and has always been defeated. Nothing can be clearer than that the manifest purpose of Congress was that all beer and wine comes within the provisions of the prohibition.

CONCLUSION.

We respectfully submit that the wording of the Act justifies the construction for which we contend, that it is not necessary to prove that the beer in question is actually intoxicating to come within the provisions of the War Prohibition Act, and that the judgment of the court below should be reversed.

Respectfully submitted.

WAYNE B. WHEELER,
ANDREW WILSON,
Attorneys, Amicus Curiae.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
STANDARD BREWERY, INCORPORATED. | No. 458.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

This case arises under and involves the constitutionality and the construction of what is known as the war prohibition act of November 21, 1918, 40 Stat., c. 212, pp. 1045, 1046–7.

THE STATUTE.

The statute provides:

> That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and

during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.

THE INDICTMENT.

Upon this act going into effect, controversy at once arose as to what malt or vinous liquors were prohibited. The Government's contention was that beer was prohibited without regard to its alcoholic content or its actual intoxicating qualities, but, insisting that beer, through a long series of congressional enactments and rulings of the revenue department acquiesced in by the manufacturers, had come to mean a malt liquor produced by the processes by which beer is produced and containing as much as one-half of 1 per cent of alcohol, conceded that such

a liquor containing less than one-half of 1 per cent of alcohol was not beer within the meaning of the prohibition. On the other hand, the brewers insisted that no malt or vinous liquor, whether called beer or what not, was prohibited unless it was, in fact, intoxicating, and that the question of its intoxicating quality was to be determined, as a matter of fact, in each case upon the evidence to be submitted.

The indictment in this case was prepared in view of this controversy and for the purpose of having it determined, and therefore alleged that on the 4th day of June, 1919, at Baltimore, in the State of Maryland, the defendant in error—

> did unlawfully use certain grains, cereals, fruit, and other food products, to wit, 195 bushels of malt and 160 pounds of hops and 2,000 pounds of grits in the manufacture and production of a large quantity of beer, to wit, 250 barrels of beer for beverage purposes, which said beer so manufactured and produced as aforesaid then and there contained as much as one-half of 1 per cent of alcohol by both weight and volume, contrary to the form of the statute in such case made and provided, and against the peace, government, and dignity of the United States. (Rec., pp. 1–2.)

THE DEMURRER.

A demurrer was filed challenging both the constitutionality of the statute and the construction which the Government put upon it.

RULING OF THE COURT BELOW.

The district judge had no difficulty with the constitutional questions raised. Indeed, these questions were not pressed in argument before him, and he treated the act as a constitutional act which was before him for construction.

In construing the act he indicated that his own opinion was in accord with the contention of the Government and that he would have overruled the demurrer but for the fact that he felt, under the circumstances, that he should follow what he understood to be the rulings which had been made by United States judges in New York. He said:

> I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I can not now say

that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the second circuit have each expressed the opinion that it has no relation to anything which is not intoxicating. I have profound respect for their opinions, not only because they are judges but because they are unusually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even although it may not be the one that I should personally have put on it had I known nothing of their views. It is, moreover, very important that this act shall be uniformly construed and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and conveniently corrected than the opposite mistake. I shall therefore sustain the demurrer. (Rec., pp. 5–6.)

RULINGS BY OTHER COURTS.

At the time the case was decided the only courts which had passed upon this act in any way were the District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit, in the case of *The Jacob Hoffman Brewing Company* v. *McElligott, Collector, et al.* The rulings made in this case were the ones referred to in the opinion of the district judge quoted above. That case was a suit in equity against the collector of internal revenue and the United States district attorney to enjoin the

former from refusing to sell revenue stamps required for the manufacture of beer and to enjoin the latter from instituting criminal proceedings on account of the manufacture of beer containing not more than 2¾ per cent of alcohol, which the bill alleged was not, in fact, intoxicating. The relief sought was predicated upon the double contention that the act was unconstitutional, or, if constitutional, did not prohibit the manufacture of beer which was not, in fact, intoxicating. The case was heard on a motion to dismiss by District Judge Augustus N. Hand, who held that the act was constitutional, but overruled the motion on the ground that the district attorney was misconstruing the act, which, he held, did not prohibit the manufacture of beer unless it was intoxicating. (259 Fed. Rep. 321.) The application for an injunction was then heard before District Judge Mayer, of the same court, who, treating the ruling of Judge Hand as settling the law for that court, granted the injunction. An appeal was taken from the order granting the injunction to the Circuit Court of Appeals. That court agreed with the District Court that the act was constitutional, but reversed the decree granting the injunction, upon the ground that the act being constitutional the court was without jurisdiction to enjoin criminal prosecutions even if those prosecutions were based upon an erroneous construction of the law. It will be seen, therefore, that the question of the true meaning of the statute was in no way involved in the judgment rendered by the court. Each of the three

judges, however, rendered an opinion and each incidentally indicated that he agreed with the construction placed upon the act by the district judge. (259 Fed. Rep. 525.) These are the opinions of the five judges which the trial judge in the present case felt he should follow and which he permitted to overrule his own views.

Since this case was decided in the District Court the same question has arisen in various other jurisdictions, and there has been a great variety in the rulings made. In the case of *United States* v. *The Pittsburgh Brewing Company et al.*, Judge Thomson, in the District Court at Pittsburgh, sustained the contention of the Government in a carefully prepared but unreported opinion, which is printed in the appendix to the Government's brief in cause No. 603, recently heard by this court. Judge Dickinson, in the District Court at Philadelphia, while ruling that the question was one which should not be decided on demurrer, concluded his opinion with this statement:

> We find ourselves in accord with the ruling of Judge Thomson of the Western District of Pennsylvania. The only difference is that he has seen fit to overrule the demurrer now, and we do not see any occasion to make any formal ruling at this time. All that is really involved is a regulation of the burden of proof, and this, as we have said, is properly a trial ruling.

In the case of *United States* v. *Schmauder*, 258 Fed. Rep. 251, District Judge Chatfield, of Brooklyn, N. Y., holding the District Court in Connecticut, likewise

sustained the Government's contention, in an exhaustive opinion.

In *United States* v. *Stenson Brewing Company*, Circuit Judge Page, holding the District Court in Chicago, Ill., reviewed with great care the decisions of the various district courts and the authorities bearing on the question and reached the conclusion that the Government's construction of the act was correct. His opinion is also printed in the appendix to the Government's brief in cause No. 603 in this court.

On the other hand, the District Court in Louisiana, in a case which is now No. 474 on the docket of this court, the District Courts at Boston, Los Angeles, in Rhode Island, and perhaps one or two other jurisdictions, have sustained the construction placed on the act by the brewers.

ARGUMENT.

The constitutional questions involved have been argued in Cause No. 589, *Elwood Hamilton, Collector*, v. *Kentucky Distilleries & Warehouse Company*, heard at the present term of the court and now under consideration. The Government's views have been fully presented in the brief filed in that case, and it is not deemed necessary now to repeat them.

The act of November 21, 1918, prohibited the manufacture of any beverage included in the commonly accepted meaning of the word "beer" without regard to its alcoholic content or the extent of its intoxicating qualities.

It must be remembered that this act was not passed under the ordinary governmental police powers, but under the special war powers of Congress. It is not

per se a measure for the general promotion of temperance; but its primary purpose was the withdrawal of manpower and foodstuffs from nonessential employment and their devotion to employment necessary for the successful conduct of the war. For this purpose, and under this power, Congress could prohibit the manufacture of nonintoxicating as well as intoxicating beverages. What was done was to place a ban upon certain beverages, whose well-known large production and consumption constituted a heavy drain upon both the labor and food resources of the country. Doubtless, for this reason, and also because they were regarded as injurious to manpower, needed both at home and at the front, the manifest purpose was to class generally as nonessential alcoholic beverages. Accordingly, the act prohibits by name the best-known and most largely consumed beverages of this class, distilled spirits, beer, and wine, beverages which are generally recognized as more or less intoxicating. And to embrace other similar but less well-known beverages there were added the general words "or other intoxicating malt or vinous liquors." It is now insisted, contrary to the Government's contention, that the word "intoxicating" relates back and modifies beer and wine as well as other unnamed liquors, so that only malt or vinous liquors which are, in fact, intoxicating are prohibited. Hence, the contention is that to bring beer within the prohibition the Government must allege and prove that it is intoxicating.

151237—19——2

Act to be construed so as to give effect to every part.

An act of Congress must, if possible, be so construed as to give effect to every part. If it had been the intention of Congress to leave the jury, in each case, to determine whether a particular malt or vinous liquor is intoxicating, and to prohibit only such as may be found, in this way, to be intoxicating, the use of the words "beer" and "wine" was idle. The object would have been accomplished by simply prohibiting "all intoxicating malt and vinous liquors." The only way to give any effect to these words is to say that whatever beverages come within the commonly understood meaning of beer and wine are prohibited, and the prohibition is then extended, by general words, to other beverages which are similar to beer and wine with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities.

Reasons for not leaving jury to determine intoxicating qualities of particular beverage.

There were cogent reasons why Congress, if it desired the law to be effective, should not have left its prohibition to depend upon how a jury in each case would determine the intoxicating qualities of a particular beverage. The word "intoxicating" can scarcely be said to have a very definite meaning. It is ordinarily defined to mean:

> Producing intoxication or feelings like those of intoxication; exhilarating; exciting, maddening, or stupefying with delight. (Standard Dictionary.)

But men will differ about what is exhilarating or exciting. One man will regard as intoxication what another will regard as too mildly exhilarating to be within that term. One expert, according to his standard of intoxication, will deem a given per cent of alcohol sufficient to render a beverage intoxicating while another will differ wholly from him. It is a well-known fact that what will make one man drunk will have no effect upon another, and a drink which, at one time, may seem not to affect a man, may, at another time, make the same man drunk. A law whose enforcement depended upon the determination by juries of such a question would rest upon a most insecure foundation, and anything like a uniform administration of it would be impossible. Hence, the States in passing prohibition laws have always enumerated by name the best-known alcoholic or intoxicating liquors and added general language to include other similar beverages. Congress, in this act, has followed the same course. Beer usually is admittedly an intoxicating beverage and is so classed in the public mind, whether a particular quantity of it will make a particular man drunk or not. To say that the Government must prove in each case that the beer involved is, in fact, intoxicating would make the efficient enforcement almost if not quite impossible.

Rule of ejusdem generis.

"Beer" without qualification is plainly prohibited unless the word "intoxicating" is made to relate back and modify it. It will be insisted that this

modifying result is accomplished under the rule *ejusdem generis*. But to make this application of that rule is to give it a meaning exactly the opposite of that which it has. The rule is that *general words* which follow an enumeration by words of a particular meaning are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. We have here an enumeration of beer and wine by words of a particular and specific meaning, followed by the general words "or other intoxicating malt or vinous liquors." Under the rule referred to the meaning of these *general words* may take color from the words used in the enumeration which they follow. But there is no rule of construction under which words of a particular and specific meaning used in an enumeration are to be given a different meaning by reason of general language following them and intended to describe other articles or persons. Thus, the words "other intoxicating" may be given a meaning reflected by the preceding words "beer" and "wine" and may be held to mean intoxicating in the general sense, or to the extent that beer and wine are intoxicating or alcoholic. But certainly the word "beer" can not be taken in an unusual or strained sense by reason of any general language describing other liquors intended to be included. The rule in question leads to the conclusion that any malt or vinous liquor which is intoxicating in the sense that beer and wine are intoxicating is

prohibited; but it can not be so applied as to exclude any beverage which would ordinarily be included under the word "beer." Clearly the intention was to prohibit all beverages which are commonly known as beer. The courts of the various States have almost uniformly given this construction to similar language. *United States* v. *Cohn*, 2 Ind. Terr. 474, 492, 501; *State* v. *Ely*, 22 So. Dak., 487, 492–493; *La Follette* v. *Murray*, 81 Ohio St., 474; *Fuller* v. *Jackson*, 97 Miss., 237, 253–256; *Extract & Tonic Co.* v. *Lynch*, 100 Miss., 650; *Marks* v. *State* (Ala.), 48 So. Rep. 864, 867; *In re Lockman*, 18 Idaho, 465, 469; *Brown* **v. *State*, 17 Ariz. 314.**

Certain cases have heretofore been cited, and will doubtless be cited again, as supporting the contention that the word "intoxicating" must be taken as modifying the word "beer" in the statute. These cases, however, when examined, do not support the argument.

United States v. *Chase*, 135 U. S. 255, involved an indictment for mailing an obscene, lewd, and lascivious letter. The act prohibited the mailing of "every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character." The effort on the part of the Government was to construe the word "writing" as including a letter sealed and deposited in the mails. The court, however, held that only a published writing was contemplated by the statute and not a private letter on the outside of which

there is nothing but the name and address of the person to whom it is written. Various reasons were assigned for this conclusion. The court said:

> In the statute under consideration, the word "writing" is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated. (Pages 258–9.)

It will be seen that the word "writing" was itself used as a general word following words used to enumerate a group or class of articles which were commonly recognized as publications. This general expression "writing" was, therefore, given color from the specific words used in the preceding enumeration. The words "book, pamphlet, picture, paper" were held to imply a publication even without reference to the use of that word in the general language following the enumeration. Another reason for the conclusion was that the court found that another and a separate and distinct clause of the act dealt with letters, and manifestly confined the prohibition of letters to those upon which the objectionable matter appeared on the envelope, thus excluding the idea that it was intended to prohibit the mailing of a sealed letter with nothing but the address on the envelope. That the court did not mean to hold

that the word "publication" could limit or modify the meaning of any definite and well-understood word used in the specific enumeration is perfectly clear from what was said when the statute was amended so as to prohibit the mailing of "every obscene, lewd, or lascivious book, pamphlet, picture, paper, *letter*, writing, print, or other publication of an indecent character." 25 Stat., c. 1039, p. 496. When this amended statute came before the court it was never supposed for a moment that the word "publication" used in the general language modified in any way the word "letter" used in the specific enumeration. *Grimm* v. *United States*, 156 U. S. 604; *Andrews* v. *United States*, 162 U. S. 420.

Another case cited is *Insurance Company* v. *Gridley*, 100 U. S. 614. This case does not involve in any sense the rule in question. An insurance company defended against a suit on a life policy on the ground that the applicant had made a false answer in his application. The question which he answered was:

> Have the person's (whose life is to be assured) parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease?

The answer was:

> No; except one brother temporarily insane six months since. Causes, domestic and financial troubles, followed by hard drinking and excessive use of opium and morphine. Recovery followed reformed habits. No hered-

> itary taint of any kind in family on either side of house, to my knowledge.

It was claimed by the company that one of the applicant's uncles had, in fact, been insane for more than a year before his death, but there was no proof as to whether the insanity was hereditary or produced by other causes. After calling attention to the wording of the answer, which was claimed to be false, namely, "no hereditary taint of any kind in family on either side of house to my knowledge," the court said:

> The affirmation was restricted and narrowed down to what the applicant himself personally knew touching the subject. It has this extent; no more.
>
> The company might have refused to insure unless the qualification were withdrawn. Having failed to do this, such is the contract of the parties.
>
> To make out the defense sought to be established by the insurers, three things were, therefore, necessary to be shown; that the alleged insanity of the uncle had existed; that it was hereditary; and that both these things were known to the applicant when he answered the question.

It will be seen that the construction of the language used in the question submitted, which alone could have been governed by the rule in question, was not involved for the reason that the defendant did not make a categorical answer thereto, but made an answer in his own language, which limited his statement to a denial of any hereditary taint. The court

merely held that the policy having been issued upon this statement the company could not successfully defend without showing that the statement as made was false without regard to the form of the question submitted.

Words to be given their ordinary meaning.

Words used in a statute must be given their usual and ordinary meaning unless a contrary intention is expressed. No such intention having been expressed, the question is, What is the usual and ordinary meaning of the word "beer"? All the dictionaries define it as an *alcoholic* beverage obtained by the fermentation of malt or certain other substances. Century Dictionary; Murray's New English Dictionary; Webster; Standard; Bouvier. But the word "intoxicating" appears in no definition. In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage. If it contains the usual ingredients of beer, including alcohol, a beverage is *beer* even though the quantity of alcohol is not sufficient to produce actual drunkenness. Nothing else appearing, it could be well said that such a beverage is beer if it contains any alcohol. But, when used by Congress, it has come to have a slightly different meaning. For years, a tax has been levied on "beer, lager beer, ale, porter, and other similar fermented liquors." Revised Statutes, sections 3335–3339. From the first the internal revenue department has ruled that the tax applied to all such beverages containing as much as one-half of 1 per cent of alcohol. Treasury Decisions 1307, 1360, 2354, 2370, and 2410.

Manufacturers acquiesced and paid the tax. Such a beverage containing as much as one-half of 1 per cent of alcohol has, therefore, long ago come to be recognized both by the Government and the manufacturers as beer. And Congress has continued from time to time in revenue laws to use the same language and may well be said to have adopted the meaning placed upon it by the Government with the acquiescence of the manufacturers. Finally, in the revenue act of 1917, passed before the act now in question, and the revenue act of 1918, passed later, Congress has expressly described beer as containing one-half of 1 per cent or more of alcohol and classed similar beverages containing less as soft drinks. It is clear, then, that when Congress used the word "beer" in the act of November 21, 1918, it used it in that sense.

CONCLUSION.

It is respectfully submitted that the allegation in the indictment that beer containing as much as one-half of 1 per cent manufactured at the time mentioned charges an offense under the statute and that no allegation as to the intoxicating qualities of the beer was necessary and that the judgment of the court below should be reversed.

Respectfully,

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

NOVEMBER, 1919.

○

Office Supreme Court, U. S.
FILED
DEC 4 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 458.

UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

against

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

WILLIAM L. MARBURY,
RANDOLPH BARTON, JR.,
WILLIAM L. RAWLS,
Counsel for Defendant in Error.

INDEX.

	Page
Table of Cases	ii
Preliminary Statement	1
Indictment	1
The True Construction of the Act of November 21st, 1918	6
Decisions of Federal Courts Upon the Act	14
The Government's Contention Examined	18
Insufficiency of Indictment	26
Constitutionality of Act	28
Conclusion	32
Act of November 21st, 1918—Appendix A	1
Proclamations of President January 30th, 1919, and March 4th, 1919—Appendix B	3 & 5

	Page
Andrews v. United States, 162 U. S. 420	15
Brown v. State, 17 Ariz. 314	17
City of Bowling Green v. McMullen, 122 S. W. 823	17
Evans v. United States, 153 U. S. 584	27
Ex parte Bain, 121 U. S. 1	6
Ex parte Mulligan, 4 Wall. 1	31
Extract & Tonic Co. v. Lynch, 100 Miss. 650	17
Fuller v. Jackson, 97 Miss. 237	17
Gridley v. Northwestern Ins. Co., 14 Blatchf. 107; 100 U. S. 614	17
Grimm v. United States, 156 U. S. 604	15
Jacob Hoffman Brewing Co. v. McElligott et al., 259 Fed. 321, 525	7
In re. Lockman, 18 Idaho 465	17
La Follette v. Murray, 81 Ohio St. 474	17
Marks vs. State (Ala.), 48 So. Rep. 864	17
Moore v. United States, 160 U. S. 274	28
Naftzger v. United States, 200 Fed. 494	6
People v. Strickler, 142 Pac. 1121 (Cal.)	17
Potts v. United States, 114 Fed. 52	16
Sinclair v. Phoenix, etc. Ins. Co., 22 Fed. Cas. 195	17
State v. Ely, 22 So. Dak. 487	17
State v. Virgo, 14 N. Dak. 293	17
United States v. American Brewing Co. (unreported)	7
United States v. Bathgate, 246 U. S. 220	7
United States v. Baumgartner, 259 Fed. 722	8
United States v. Bergner, etc. Brewing Co. (unreported)	8
United States v. Blatz Brewing Co. (unreported)	8
United States v. Carll, 105 U. S. 611	28

Page

United States v. Chase, 135 U. S. 255 14
United States v. Cohn, 2 Ind. Terr. 474 17
United States v. D. & H. Co., 213 U. S. 266 32
United States v. Henley Brewing Co. (unreported) 8
United States v. Hess, 124 U. S. 483 28
United States v. Jin Fuey Moy, 241 U. S. 394 32
United States v. Loftis, 12 Fed. 671 15
United States v. Mohr (unreported) 8
United States v. Petts (unreported) 8
United States v. Pittsburg Brewing Co. (unreported) 8
United States v. Porto Rico Brewing Co. (unreported) 8
United States v. Ranier Brewing Co., 259 Fed. 359 7
United States v. Schmauder, 258 Fed. 251 8
United States v. Simmons, 96 U. S. 360 28
United States v. Stenson Brewing Co. (unreported) 8
United States v. United Verde Copper Co., 196 U. S. 207 16

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 458.

UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,

against

STANDARD BREWERY, INCORPORATED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

The question presented for decision in this case is whether the action of the United States District Court for the District of Maryland, in sustaining the demurrer to an indictment against the defendant in error was correct.

The indictment alleges (Record, pages 1 and 2) that the defendant,

> "Heretofore, to wit, on the 4th day of June, in the year of our Lord, 1919, at Baltimore, in the State of Maryland and District aforesaid, did unlawfully use certain grains, cereal, fruit and other food products, to wit, 195 bushels of malt, 160 pounds of hops and 2,000 pounds of grits, in the manufacture and production of a large quantity of beer, to wit, 250 barrels of beer for beverage purposes, which said

beer so manufactured and produced as aforesaid, then and there contained as much as one-half of one per cent. of alcohol, by both weight and volume; contrary to the form of the statute in such case made and provided, and against the peace, government and dignity of the United States."

At the foot of the indictment is a note referring to the Act of November 21, 1918, Section 4.

The indictment was found on June 11, 1919.

The question presented by this demurrer is whether the allegations of the indictment as above set forth are sufficient to charge an offence against the laws of the United States. The defendant states in several different forms in its demurrer as causes for demurrer that the indictment does not allege facts constituting an offence under any of the laws of the United States and particularly that it does not state facts sufficient to charge an offence under the Act of Congress of November 21, 1918, section 4, referred to upon the indictment. The demurrer further states as a cause for demurrer that the Congress of the United States was without power under the Federal Constitution to enact section 4 of the Act of November 21, 1918, and that the same is therefore invalid and void in so far as it may be considered to forbid the use at the time mentioned in the indictment of food products in the manufacture of beer for beverage purposes. These two main questions thus arising upon the demurrer will be discussed in this brief in the order stated.

There is printed as Appendix A to this brief a copy of that part of section 4 of the above Act which is pertinent to this discussion, with the particular clauses thereof with which the Court is directly concerned italicized. There is no other Act of Congress under which, by any possibility, it could be claimed that an offence such as that stated in the indictment is created.

The Act of October 28th, 1919, commonly known as the Volstead Act, enacted to enforce the Act of November 21, 1918, can of course not operate so as to make anything a crime which was done prior to the passage of that Act. If it were lawful to manufacture non-intoxicating beer on the 4th day of June, 1919, the date upon which the offence in this case is alleged to have been committed, it is, of course, too clear for argument that any subsequent amendment of the law purporting to make the act here charged against the defendant an offence as of the date of its occurrence, would be an *ex post facto* law and plainly unconstitutional. But the Volstead Act does not purport to have any such retroactive effect. In so far as it changes the definition of intoxicating liquors for the purposes of the Act of November 21, 1918, the Volstead Act, by its own terms, is only "*hereafter*" operative.

The Act of Congress of August 10, 1917, entitled "An Act to provide further for the national security and defense by encouraging the production, conservation of supply and controlling the distribution of food products and fuel," creates no offence such as that alleged in the indictment. It may, for the purpose of clearness, be well to state that the President of the United States was authorized by section 15 of the last-mentioned Act, when he found "that limitation, regulation or prohibition of the use of foods, fruits, food materials or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor is essential in order to insure the adequate and continuous supply of food that the national security and defense will be subserved thereby," etc., to prescribe and give public notice of the extent of the limitation, regulation, prohibition or reduction so necessitated. It further provided that whenever such notice was given and remained unrevoked, no person should after a reasonable time prescribed in such notice,

use any of the materials mentioned in the President's proclamation in the production of malt or vinous liquors, except under license issued by the President, and in compliance with rules and regulations determined by him, authorizing the production and importation of such liquors and the alcoholic content thereof. Penalties were then prescribed for violations of the said Act, and of any rule or regulation made by the President in pursuance thereof.

The President, under the authority so conferred upon him by this Act of August 10, 1917, has from time to time issued proclamations setting forth certain limitations upon the use of the materials therein mentioned in the manufacture of malt or vinous liquors, and fixing the alcoholic content thereof. It is not necessary to set out in detail the terms of these several proclamations. It is sufficient for the purposes of this case to say that on January 30, 1919, the President issued a proclamation modifying an earlier proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, and later, on March 4th, issued another proclamation further modifying that of September 16, 1918, wherein he stated that:

> "And, whereas, for the production from a cereal base of non-intoxicating beverages which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, and for which the use for such beverages is prohibited by the aforesaid proclamation of September 16, 1918, are required;" etc.

The President in this proclamation (March 4, 1919), then proceeds to modify the proclamation of September 16, 1918, so as to permit the use of sugar and glucose, corn, rice and any other foods, fruits, food materials, hops and malt in the manufacture of non-intoxicating malt liquors for beverage purposes. The proclamations

of the President of January 30, 1919, and March 4, 1919, above referred to, are printed as Appendix B to this brief.

It thus appearing that the President, under the authority vested in him by Congress, has authorized the use of the materials and food products mentioned in the Act of August 10, 1917, in the manufacture of non-intoxicating malt beverages, it follows, that unless the indictment in this case contains an allegation to the effect that the beverage produced by the defendant on June 4th was in fact intoxicating, no offence is alleged under that Act. There being obviously no such allegation nor any allegation equivalent thereto, no further reference need be made to the Act of August 10, 1917.

Upon examining the indictment it will be found that it simply alleges that the defendant used on June 4th the materials named in the manufacture and production of

> "a large quantity of beer, to wit, 250 barrels of beer for beverage purposes, which said beer manufactured and produced as aforesaid then and there contained as much as one-half of one per cent. of alcohol by both weight and volume."

The indictment evinces a clear intention upon the part of the Government to refrain from alleging that the product mentioned is intoxicating. It further shows an intention upon its part not to allege that the product manufactured by the defendant was beer as ordinarily understood, but a specific and peculiar kind of beverage described as *beer containing as much as one-half of one per cent. of alcohol.* The inference is clear that the Government did not feel justified in describing the product produced by the defendant simply as beer, but desired to describe a different thing from what is ordinarily and usually understood to be beer, and therefore coupled with the word "beer" a statement as to its specific alcoholic content. The alcoholic content thus stated is an essen-

tial and primary part of the description of the thing alleged to have been manufactured and produced by the defendant, and is equally as much a means of identification of the product mentioned in the indictment as the word "beer" itself. *Ex parte Bain,* 121 U. S. 1, 4-13; *Naftzger vs. United States,* 200 Fed. 494.

THE TRUE CONSTRUCTION OF THE ACT OF NOVEMBER 21, 1918.

Under the allegations of the indictment, therefore, unless it can be shown that section 4 of the Act of November 21, 1918, prohibits the use of the materials named therein in the manufacture of a beverage described as beer containing as much as one-half of one per cent. of alcohol by both weight and volume, no offence is alleged under that Act. The defendant submits that the Act of November 21, 1918, does no such thing.

The proper construction of that Act prohibiting after May 1, 1919, the use of food products in the manufacture, and after July 1st the sale of

> "beer, wine or other intoxicating malt or vinous liquor for beverage purposes"

requires that the descriptive term "or other intoxicating malt or vinous liquor" should be deemed to relate back and define the immediately preceding words "beer" and "wine," for otherwise the word "other" would have no meaning or use whatever. In other words, that the liquors referred to in the clause quoted are by reason of the language used intended to be described as one class having the common characteristic of being intoxicating. Any other interpretation would render the word "other" wholly meaningless and useless in the clause and would so entirely change the ordinary, natural import of the language employed as to amount to a rewriting of a law by the Court.

When after mentioning beer and wine the clause proceeds, "or other intoxicating malt or vinous liquors, etc.," the conclusion is irresistible that the beer and wine intended to be referred to are intoxicating beer and wine.

It should always be remembered that this is a case of a prosecution under a highly penal statute, a statute in derogation of common right. It is therefore subject to the just and reasonable rule of construction applicable to such statutes. This has been many times stated and followed by this Court, and in the recent case of *United States v. Bathgate*, 246 U. S. 220, 225, was thus reiterated:

> "There can be no constructive offences, and before a man can be punished his case must be *plainly and unmistakably within the statute.*"

The construction upon which the Government seeks to sustain the indictment, we submit, is not only not a plain and unmistakable one, but on the contrary is opposed to the language which Congress has deliberately employed, and to the intention and purpose of Congress as evidenced by all the provisions of the Act.

The contention here made by the defendant in error is the one announced by Judge HAND in the District Court for the Southern District fo New York (259 Fed. 321), and unanimously affirmed by the Judges of the Circuit Court of Appeals of the Second Circuit in the case of *Jacob Hoffman Brewing Co. v. McElligott et al.*, 259 Fed. 525.

And in the following cases the same construction of this statute was adopted:

United States v. American Brewing Co. (U. S. Dist. Ct., E. Dist. of Louisiana). Unreported.

United States v. Ranier Brewing Co. (U. S. Dist. Ct., N. Dist. of California), 259 Fed. 359.

United States v. Baumgartner (U. S. Dist. Ct., S. Dist. of California), 259 Fed. 722.

United States v. Petts (U. S. Dist. Ct. of Massachuetts).

United States v. Henley Brewing Co. (U. S. Dist. Ct. of Rhode Island). Unreported.

United States v. Mohr (U. S. Dist. Ct., W. Dist. of Wisconsin). Unreported.

United States v. Porto Rico Brewing Co. (U. S. Dist. Ct. of Porto Rico). Unreported.

United States v. Blatz Brewing Co. (U. S. Dist. Ct., E. Dist. of Wisconsin).

In the following cases the Government's contention was upheld:

United States v. Pittsburgh Brewing Co. (U. S. Dist. Ct., W. Dist. of Pennsylvania). Unreported.

United States v. Schmauder (U. S. Dist. Ct. of Connecticut), 258 Fed. 251.

United States v. Stenson Brewing Co. (U. S. Dist. Ct., N. Dist. of Illinois). Unreported.

In the case of *United States v. Bergner, etc., Brewing Co.* (U. S. Dist. Ct., E. Dist. of Pa., unreported), the Court refused to pass upon the question of construction when raised by a demurrer.

The language employed by Congress manifests a clear intention upon its part to deal in this statute with intoxicating liquors alone. To have prohibited anything other than intoxicating liquors, as contrasted with non-intoxicating liquors, would have been beyond the object which Congress had in view. Such a prohibition would have had no relation to that object. The Act does not leave to inference the reason which led Congress to enact it. It expressly declares that it is passed

"For the purpose of conserving the man power of the Nation and to increase efficiency in the production of arms, munitions, ships, food and clothing for the Army and Navy," etc.

Anything, therefore, which could not injuriously affect or in any way impair the man power of the Nation or decrease efficiency in the production of the supplies for the army and navy, and the instrumentalities of war, enumerated in the Act, cannot reasonably be said to be within the scope of the prohibition therein contained. In order to impute to Congress the intention to include within the prohibition of this legislation the manufacture of a product which is perfectly harmless and which may be lawfully manufactured even in states having general prohibition legislation, the language of the Act, which it is asserted shows such an intention, ought to be clear and unmistakable.

To adopt any construction other than the one which would require all malt liquors to be intoxicating in order to be within the prohibition of the statute would lead to an extraordinary inconsistency in its provisions. Although the Government has contended that beer is prohibited irrespective of its intoxicating character, it has never contended heretofore that any other malt liquor is so prohibited, for it recognizes that all other malt beverages, and there are a number of them, must be "intoxicating malt * * * liquor" in order to be brought within the condemnation of the statute. But no reason has ever been suggested why Congress should prohibit non-intoxicating beer and not prohibit non-intoxicating ale and porter. It cannot be said that ale and porter are the same thing as beer, because the revenue acts since 1866 have treated beer as contradistinguished from ale and porter. The Act of July 13 of that year thus described malt liquors subject to taxation: "Beer, lager beer, ale, porter or other similar fermented liquor by whatever

name such liquor may be called." See also Revenue Act of October 3, 1917, 40 Stat. 311, Sec. 307; Revenue Act February 24, 1919, 40 Stat. 1109.

So that no object could possibly have been within the contemplation of Congress in prohibiting the manufacture and sale of non-intoxicating beer which would not have been entirely defeated by the right to manufacture all other non-intoxicating malt liquors which Congress deliberately left undisturbed.

Any force in the suggestion, therefore, that beer, whether intoxicating or not, was intended to be prohibited as a means of making effective the prohibition upon intoxicating liquors by removing the temptation or opportunity to produce and sell actually intoxicating liquors under the guise of harmless beverages, vanishes when it is seen that the statute permits under its plain language the manufacture of other non-intoxicating malt liquors which would afford exactly the same opportunity for violations of the law as the manufacture and sale of non-intoxicating beer.

There being thus no reason for any differentiation between non-intoxicating beer and any other non-intoxicating malt liquor, it is not to be supposed that Congress intended to favor those who produced and sold the one, over those who produced and sold the other. It is only by a strained, unnatural and, as we submit, inadmissible construction of the language of this Act that such a result can follow. By giving to the word "other" its usual signification and effect, the descriptive term "intoxicating" relates back and qualifies the word "beer," and thus only prohibits its manufacture when it has the character of the other malt liquors the manufacture and sale of which are prohibited—namely, that of being intoxicating.

That it was the purpose of Congress to prohibit by the Act of November 21, 1918, the manufacture and sale of intoxicating liquors only is plainly evidenced by the subsequent provisions of the same section of the Act dealing with the importation of liquors, and their manufacture, sale and distribution in zones which the President is empowered to establish about coal mines, munition factories, shipbuilding plants, etc.

With respect to importation it is provided: "After the approval of this Act *no distilled, malt, vinous or other intoxicating liquors* shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, that this provision against importation shall not apply to shipments *en route* to the United States at the time of the passage of this Act."

It of course cannot be contended that in this clause of the Act the word intoxicating does not relate back and qualify the antecedently enumerated liquors. Non-intoxicating malt liquors may therefore, so far as this Act is concerned, *be imported* into the United States.

The Government's contention with respect to the provisions prohibiting the manufacture and sale *in the United States* of "beer, wine and other intoxicating malt and vinous liquors for beverage purposes" leads therefore to this strange result: That although a citizen of the United States cannot buy a non-intoxicating beer from a domestic manufacturer or dealer, he may import it into the United States.

The fact that the provision as to importation was, under the terms of the Act, to go into effect from the date of its pasage, while the provision with respect to manufacture and sale in the United States did not become operative until later, affords no ground for saying that the scope of one provision was intended to be broader or

narrower than that of the other. There is no conceivable reason why Congress could not have dealt immediately with the importation of liquors in the same way as it intended ultimately to deal with them from the standpoint of domestic manufacture and sale. Upon the contrary, the considerations of policy which would weigh with Congress in postponing the operation of the provisions with respect to manufacture and sale of liquors in the United States would have no weight at all with respect to the provision having to do with their importation. It would impute to Congress a most remarkable confusion of purpose to say that although non-intoxicating malt liquors could be imported at any time, under the provisions of the Act, yet they could not be manufactured and sold in the United States after May 1st and June 30th respectively. All this contradiction and confusion does not follow from anything appearing in the Act itself, but from the construction which the Government seeks, without warrant, as we submit, to place upon the language employed. By giving to the word "other," as used in the clause particularly under consideration its ordinary significance, all incongruity and conflict between the various clauses disappear, and a single harmonious purpose becomes manifest, namely, to prohibit by all its provisions only those liquors which are in fact intoxicating.

And so as to the zones which the President was empowered to establish. This power he was to have from the date of the passage of the Act. It is manifest that if Congress believed that there was any necessity at all for the prohibition upon the manufacture and sale of non-intoxicating liquors that this need would be most urgent in the immediate vicinity of those places where industrial plants whose efficient operation was essential to the successful prosecution of the war were located. The President, however, was only empowered

"to prohibit the sale and manufacture or distribution of *intoxicating liquors* in such zones."

The construction of the Act which the Government advances would compel us to assume, that although Congress was pursuing the purpose of more effectually prosecuting the war, it proceeded upon the anomalous formula that the rigor of its laws should diminish in the exact proportion that a reasonable regard for the end to be attained would require it to increase.

When the clause of the Act of November 21st, 1918, upon which this indictment purports to be founded, is examined, it will be found that Congress could not have intended to deal with anything thereunder, except intoxicating liquors. For the purpose of convenience, the clause is here repeated:

> "After May 1st, 1919, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grain, cereal or other food product shall be used in the manufacture or production of *beer, wine or other intoxicating malt or vinous liquors, for beverage purposes.*"

The term "other intoxicating," following the words beer and wine, clearly shows that only intoxicating beer and wine were intended to be prohibited. It is only by giving the clause this meaning that the word "other" can be given any significance. But the clause proceeds to say: "other intoxicating malt or vinous liquor." This shows that *the beer* intended to be prohibited was that which was an intoxicating malt liquor, and that *the wine* was an intoxicating vinous liquor. In other words, that both the qualifying words "intoxicating and malt" are coupled with the word "beer," and that the words "intoxicating and vinous" are coupled with the word "wine." At the end of the clause are the words "for beverage purposes," which, of course, refer back and qualify all the liquors

previously mentioned. Thus it is shown that Congress only intended to deal with malt and vinous liquors, by whatever name they might be called when they met the two conditions specified, viz: when they were intoxicating and when they were manufactured for beverage purposes. The language used is so clear that it is scarcely capable of any elucidation. The interpretation which is here placed upon it is that which the mind naturally gives it, without any effort, and the one which a critical examination of the text of the statute confirms.

It is the interpretation which is required by the rules of construction which this Court and other courts have uniformly applied to similar language. The case of *United States v. Chase*, 135 U. S. 255, involved the same question of statutory interpretation. It arose under the Act of Congress of July 12th, 1876, 19 Stat. 90, which prohibited the use of the mail for "every obscene, lewd, or lascivious book, pamphlet, picture, *paper, writing*, print or other *publication* of an indecent character." The indictment charged the mailing of a *sealed* and addressed *letter* of an indecent character. One of the questions presented was whether the words "*or other publication*" qualified the preceding words "paper" and "writing," so as to prohibit these when they had the quality of "publication," thereby excluding from the statute *sealed, private letters*, which had not been published. It was held by this Court that, under a well-defined rule of construction, the words "other publication" related back and qualified the words preceding them, and, consequently, only published papers and published writings were prohibited by the statute.

This Court said, speaking through Mr. Justice Lamar (pp. 258 & 9):

> "In the statute under consideration, the word 'writing' is used as one of a group or class of words, —book, pamphlet, picture, paper, writing, print,—

each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated.

"It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

In an earlier case, arising under the same statute, *United States v. Loftis*, 12 Fed. 671, Judge Deady applied the same rule of construction, as follows:

"Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a 'publication.' This word 'writing' occurs in an enumeration of things—books, pamphlets, pictures, prints and papers—which *ex vi termini* are prima facie publications.

"The general phrase with which the enumeration ends, 'or other publication of an indecent character,' impliedly asserts that the things before enumerated are publications. The expression 'John and James and other men' is one in which, by a necessary implication, it is asserted that John and James are men."

After the above cases arose, the Act of Congress of July 12th, 1876, was amended by the Act of September 26th, 1888 (25 Stat. 496, c. 1039), by inserting the word "letter" in the list of prohibited publications, and adding the provision "whether sealed as first-class matter or not." It was thereafter held that the Statute, as amended, applied to the mailing of a private sealed letter.

Grimm vs. United States, 156 U. S. 604.
Andrews vs. United States, 162 U. S. 420.

The meaning and effect of the word "other" when similarly used in a statute was again declared by this

Court in *United States v. United Verde Copper Co.*, 196 U. S. 207, where there was presented for interpretation the Act of Congress of June 3rd, 1878 (20 Stat. 88, c. 150), permitting the use of timber on the public lands "for building, agricultural, mining and other domestic purposes." The question presented was whether the phrase "other domestic" qualified the preceding words. This Court, speaking through Mr. Justice McKenna, said (at p. 213):

> "Counsel for the Government recognizes this, and substitutes for 'domestic' the word 'household' and contends that the word 'other' should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for 'building, agricultural, mining or *domestic* purposes.' But we are not permitted to take such liberty with the statute, if 'domestic' has a meaning consistent with the intentional use of the word 'other.' It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a country, state or nation, according to the object in contemplation. So in the statute the word 'domestic' applies to the locality to which the statute is directed, and gives permission to the industries there practised to use the public timber. This definition of 'domestic' gives the word an apt and sensible meaning and we must regard the association of the word 'other' with it as designed, not accidental."

In *Potts vs. United States*, 114 Fed. 52, there was presented the interpretation of the Act of Congress, 23 Stat. 231, providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means*, shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands. The Circuit Court for the Ninth Circuit said (at p. 54).

"By a well-known rule of construction the words 'or any other unlawful means' in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words 'fencing' and 'inclosing,' so that those words must be read as 'unlawful fencing' and 'unlawful inclosing'."

See further:

Gridley v. Northwestern Mutual Life Ins. Co., 14 Blatchf. 107, 108, affirmed 100 U. S. 614.

Sinclair v. Phoenix Mt. L. Ins. Co., 22 Fed. Cas. 195.

In the State Courts, where the word "other" has been used in a similar way in statutes dealing with intoxicating liquors, the decisions have been in accordance with the rule of construction announced by this Court, and other Federal Courts, in the above cases.

In *City of Bowling Green v. McMullen*, 122 S. W. 823, 825, the Court of Appeals of Kentucky declared that a non-intoxicating malt liquor did not come within the meaning of a statute relating to "spirituous, vinous, malt or other intoxicating liquors." In *State v. Virgo*, 14 N. Dak. 293, 295, the same interpretation was placed upon substantially the same language, and see *People v. Strickler*, 142 Pac. 1121, 1123 (Cal.).

Other cases in the State Courts relied upon by the Government, (*United States vs. Cohn*, 2 Ind. Terr. 474; *State v. Ely*, 22 So. Dak. 487; *LaFollette v. Murray*, 81 Ohio St. 474; *Fuller v. Jackson*, 97 Miss. 237; *Extract & Tonic Co. v. Lynch*, 100 Miss. 650; *Marks v. State* (Ala.), 48 So. Rep. 864; *In re Lockman*, 18 Idaho 465; *Brown v. State*, 17 Ariz. 314), are not in conflict with the state decisions above referred to. They were decided upon statutes containing different language from that here involved and the Courts were in several of them guided by a legislative history which pointed to an intention to make the law all-inclusive. These cases have been ela-

borately reviewed in the Supplemental Brief of counsel in No. 603, argued in this Court of November 21st, and will therefore not be again examined.

II.

THE GOVERNMENT'S CONTENTION EXAMINED.

If the construction of the statute which has just been urged is not accepted, what other construction is there that this Court can adopt? The Government has heretofore contended that the effect of the language under consideration is such as to bring not only intoxicating beer and wine within the prohibition of the statute, but all beer and wine regardless of alcoholic content, and regardless of its intoxicating or non-intoxicating character. No one has yet laid down any definition of beer which can be used for the purpose of determining what would be included within the term as thus construed.

The Government in this case admits, certainly in effect, by the form in which the indictment is drawn, that some percentage of alcohol is necessary even to give it a semblance of a ground to argue that a given product is beer. The indictment alleges that the beverage mentioned therein contained as much as one-half of one per cent. of alcohol. Why one-half of one per cent.? If the presence of less than one-half of one per cent. does not render a given beverage subject to classification as beer, by what definition, rule or standard does the presence of as much as one-half of one per cent. bring it within that class of beverages?

That there is a line of demarcation between what is beer, and what is not beer, dependent upon the amount of alcohol present, is, as we have seen, a conceded fact in the case. But certainly this Court will not undertake here upon this demurrer to erect a standard as to the

percentage of alcohol necessary to make a beverage "beer" unless there are facts of which it will take judicial notice which clearly establish that there is a definite, certain and incontrovertible standard which it must follow. It will appear later that instead of there being a test of which the Court must take judicial notice, enabling the Court to hold that one-half of one per cent. of alcohol is enough to make a fermented malt beverage "beer," the fact is just to the contrary.

If the Government relies upon its construction of the Act of November 21, 1918, to the effect that all beer is included within the prohibition thereof, why did it not simply allege that the product charged as having been manufactured by the defendant was "*beer?*" The reason why this was not done, we submit, is clear. Simply because everyone knows that no Court would hold that all kinds of beer, such, for instance, as root beer, ginger beer and many others, were within the prohibition of the statute. If, however, this is answered by saying that only *malt* beer is intended, it follows plainly that such a limitation can only be imposed on the general term "*beer*" by reason of the expression, "or other intoxicating *malt* and vinous liquor," and, of course, if the word *malt* reflects back and limits the general word beer, then by irresistible logic the word "intoxicating" does the same thing.

This is the indisputable effect of the Government's position so far as the language of the Act of Congress is concerned. But suppose the Government ignores the statute and says that this is a law dealing with intoxicating liquor and that the kind of beer dealt with is the same kind that is dealt with in similar statutes upon the same subject. Here, again, so to qualify the all-inclusive signification of the word—that is, the meaning which would embrace root beer, ginger beer, near beer and everything called beer—in this way, leads exactly to the

same result as the reasoning from the statute itself—namely, that "beer" must be not only malt beer, but intoxicating beer. For surely no one would for a moment contend that there can be deduced from the course of legislation in the several states of this country a fixed, unvarying rule, to prohibit the manufacture and sale of all malt beer entirely, regardless of whether it is or is not intoxicating.

There is no ruling by any department of the Government laying down any standard by which a given beverage is to be classed as beer as distinguished from any other fermented liquor. The alcoholic percentage mentioned in the indictment doubtless was suggested by certain rulings of the Internal Revenue Deaprtment upon certain sections of the Revenue Law, but in no instance* has the Department ever undertaken to differentiate between "beer, lager beer, ale, porter and other similar fermented liquors," or between intoxicating and non-intoxicating beverages. No occasion has arisen for any such differentiation.

It was stated by counsel for the Government below that for a long period of years beer had been taxed as beer specifically, the inference sought to be drawn from this statement being that if the word "beer" had been used in a revenue statute, thus rendering it necessary for the departments of the Government to deal with beer specifically, thereby an established definition of the word would result and it would follow that when the same word was used in this Act of November 21, 1918, Congress would be presumed to have intended it to have the meaning thus established. But no basis exists for such an inference. Congress has taxed since 1866 "all beer, lager beer, ale and other similar fermented liquors brewed or manufactured, sold or removed for consump-

*That is prior to the controversy arising under the Act of November 21, 1918.

tion or sale within the United States by whatever name such liquors may be called," etc. 14 Stat. 164, Sec. 48.

It will thus be seen that while beer is one of the enumerated beverages made subject to the tax it is also included within the general expression "fermented liquors." The only question with which the Commissioner of Internal Revenue has had to deal has been whether or not a given liquor was a *fermented* liquor within the meaning of this section. All fermented liquors have been taxed in exactly the same way regardless of their various classifications, that is, they have all been taxed as *fermented liquors.*

A special tax upon brewers has been imposed since the Act of July 13, 1866, being Section 3244 of the Revised Statutes, which section contains the following:

> "1. Brewers shall pay $100. Every person who manufactures fermented liquors of any name or description for sale from malt, wholly or in part, or from any substitute therefor shall be deemed a brewer; provided, any person that manufactures less than 500 barrels a year shall pay the sum of $50.00."

Under the same section of the Revised Statutes there is imposed a tax of $20.00 upon "retail dealers in malt liquors" and a tax upon "wholesale dealers in malt liquors."

The rulings of the Department are to the effect that each of the classifications of "malt liquors" and "fermented liquors" includes the other, that is, each must be both fermented and malt. It is thus obvious that the question as to the difference between the beverages enumerated could never have arisen in the administration of any of these sections of the Revised Statutes because it was sufficient for the purposes of taxation if any particular liquor was a *fermented malt* liquor.

The question *has* arisen as to what is a fermented malt liquor within the meaning of these sections and the Com-

missioner of Internal Revenue has ruled that nothing can come within this general classification unless it has an alcoholic content of as much as one-half of one per cent. by volume. This ruling was based upon the principle that anything containing less than one-half of one per cent. of alcohol was either not fermented or not made from malt or any substitute for malt. The percentage of one-half of one per cent. of alcohol was selected because it was determined by the chemists of the Government that where so insignificant an alcoholic content was present such a liquor could not be said to be within the classification of a fermented malt liquor subject to the tax. This will appear by T. D. 1307, as follows:

"TREASURY DEPARTMENT.

Office of Commissioner of Internal Revenue.

Washington, D. C., Feb. 5, 1908.

Gentlemen:

This office is in receipt of your letter of the 31st ult. relative to the manufacture of soft drinks from malt and hops, and calling attention to previous rulings of this office as to the requirement of tax on a fermented liquor made from malt regardless of the percentage of alcohol contained, and as to the non-requirements of special tax for the sale of beverages containing less than one-half of 1 per cent. of alcohol.

In reply you are advised that after careful consideration I have reached the conclusion that, while Section 3339 R. S. requires the payment of the tax of $1 per barrel on all beer, lager beer, ale, porter and other similar fermented liquors, the practical administration of the law necessitates the fixing of a point below which the alcoholic content is too inconsiderable to class the beverage as either of the liquors enumerated above, or similar thereto, or to bring same within the consideration of the internal revenue laws. The practice and rulings of this office have already fixed this point as one-half of 1 per cent. in

the case of sales of beverages of this character, and I see no sufficient reason for making a distinction between the manufacturer and dealer in this class of beverages. It is, therefore, held that beverages containing not more than one-half of 1 per cent. of alcohol by volume do not come within the consideration of the internal revenue laws either as to manufacture or sale.

Respectfully yours,
JOHN G. CAPERS,
Commissioner.

Mr. —— ————
Lexington, Ky."

But however the different sections of Internal Revenue Law with their comprehensive language, may have been enforced *for the purpose of collecting revenue,* it has nothing whatever to do with the interpretation of the Act of November 21, 1918. It is well known, of course, that the Revenue Laws are interpreted with the utmost liberality by the Internal Revenue officials in favor of the Government, and that everything that it is possible to bring within the reach of those laws is held by them to be included therein. Of course, no one would seriously contend that the standard established by the Government officials themselves for the purposes of determining what is a fermented liquor can be used for the purpose of determining what is an intoxicating liquor or determining what is *beer.* The Commissioner of Internal Revenue has expressly ruled, T. R. 804, "that the question whether a fermented malt liquor is intoxicating is immaterial under the Internal Revenue Laws, although it may be a very important question under the prohibitive laws of a state or under local ordinances."

So that even if the Court should consult the rulings of the Commissioner of Internal Revenue for the purpose of determining what is an intoxicating liquor or what the alcoholic content of any given beverage is, as a matter of fact it would receive no light whatever upon these questions from those rulings.

It has already been pointed out that the Act of Congress of August 10, 1917, gives the President power to regulate the use of food materials in the production of "malt or vinous liquors for beverage purposes," thus showing that Congress knew how to express itself when its object was to forbid the production of malt and vinous liquors regardless of their intoxicating or non-intoxicating character. It is clear that its intention there was to deal generally with all malt and vinous liquors just as the Revenue Law dealt with all fermented malt liquors. If it had been the intention of Congress when it passed the Act of November 21, 1918, to include all malt liquors within the prohibition of that Act it had a precedent before it containing apt language for that purpose, and it can hardly be conceived that if it had been its intention to make the Act of November 21, 1918, as sweeping as the Government contends in this case it did, it would not have employed the same language which it used in the earlier Act.

Of course, it is apparent that in dealing with the question of conservation under the Act of August 10, 1917, the use of food products in the manufacture of non-intoxicating beverages was as much a thing to be prohibited as their use in intoxicating liquors; and accordingly Congress vested in the President authority to prohibit the use of such products in all malt and vinous beverages regardless of whether they were intoxicating or not. But under the Act of November 21, 1918, passed as it expressly declares for the purpose of conserving the man power of the country, the manufacture or sale of non-intoxicating beverages could have no possible connection with such purpose so announced by Congress, and accordingly we find language in the Act which plainly discriminates between intoxicating and non-intoxicating beverages. The same reasoning applies with equal force to the Internal Revenue Laws.

Where Congress was passing a statute for the purpose of raising revenue it used a comprehensive expression because it desired to bring a large number of things within the tax imposed, and if Congress had intended when it enacted the Act of November 21, 1918, to make the prohibition therein contained as broad as the scope of the tax in the Revenue Law, it would have used the same language or language plainly as comprehensive.

The Government insists that if this provision of the Act of November 21, 1918, is held to mean that only actually intoxicating liquors are prohibited thereunder, a question of fact will be presented in each case as it arises, with a consequent variation of opinion among courts and juries upon the question of what liquors are in fact intoxicating. It would be a sufficient answer to this to say that there is no more difficulty under this statute in that respect than there is under any other where it is necessary to prove as an element of the offence, that the thing sold or manufactured is the thing the selling or manufacture of which the law forbids. But there is even a more conclusive answer afforded by what appears in the very Act under consideration. It must be conceded by the Government that under the clause with respect to importation and that conferring power upon the President to establish zones, malt and vinous liquors are only prohibited when they are *intoxicating*. As these provisions would without doubt present exactly the same question of fact in their enforcement which the Government says would arise upon the construction for which we contend with respect to the particular provision under which this indictment is brought, it can hardly be supposed that Congress regarded this suggested difficulty as having any substance at all.

Further than this, however, we have already pointed out that the Government does not contend that any malt liquor other than beer is prohibited irrespective of

whether it is intoxicating or non-intoxicating; in other words, it does not contend, as we understand, that the manufacture of ale, porter, stout or any malt liquor other than beer is forbidden by the statute unless it can be proved to the satisfaction of a court or jury, as the case may be, that it is intoxicating as a matter of fact. This being true, with respect to all these malt beverages, what possible reason can be urged for holding that in this respect beer was placed by Congress upon any different footing.

It is further urged by the Government that as beer is a malt liquor and wine a vinous liquor it would have been unnecessary for Congress to use any words in addition to the expression "intoxicating malt and vinous liquor" if it had intended to include in the prohibition only intoxicating beer and wine. In other words, it urges that the construction for which we contend would render the words "beer" and "wine" unnecessary. But this simply amounts to a criticism of style, for such circuity or tautology of expression is general in legislative draftsmanship. The statutes involved in the cases hereinbefore referred to, declaring the effect of the use of the word "other," are all illustrations of this mode of expression, and they are numerous in Federal as well as in State legislation. The question here is, what does the language employed mean? We are not concerned with the question as to whether Congress could have expressed its meaning by a different form of words.

III.

THE INDICTMENT IS INSUFFICIENT TO CHARGE AN OFFENCE UNDER THE ACT AS PROPERLY CONSTRUED.

The proper construction of the Act of November 21, 1918, having been shown to be that it only prohibits the

manufacture and sale of beer and wine which are in fact intoxicating, the effect of this construction with respect to the legal sufficiency of the allegations of the indictment should be briefly indicated.

It is clear that in order to allege an offence within the purview of the Act, the indictment must show upon its face that the beer manufactured and produced from the material named in the indictment must have been an intoxicating beer. The Act clearly distinguishes between intoxicating and non-intoxicating beer, prohibiting the manufacture only of the former. What might have been the case had the Government charged the manufacture of "beer" simply, there is no occasion to discuss, because no such question is here presented. The indictment charges, not the manufacture of "beer," but the manufacture of beer containing as much as one-half of one per cent. of alcohol. This qualification and restriction upon the word "beer" (assuming for the sake of the argument merely that the use of the word beer alone would have been sufficient to have charged an offence), entirely destroys and nullifies any implication which it might be argued the unqualified use of the term would justify, and renders it impossible for the Court to say, as matter of law, to which of the classes contemplated by the statute, beer containing as much as one-half of one per cent. belongs. For, unless this Court can take judicial notice of the percentage of alcohol which renders a given beverage either intoxicating or non-intoxicating it cannot know into which class the beverage mentioned in the indictment falls.

The rules of criminal pleading laid down by this Court require that "The crime must be charged with precision and certainty and every ingredient of which it is composed must be accurately and clearly alleged." *Evans v. United States*, 153 U. S. 584, 587.

This Court, speaking through Mr. Justice Brown, i
the case just cited, said:

> "Even in cases of misdemeanors the indictmen
> must be free from ambiguity and leave no doubt i
> the minds of the accused and the court of the exac
> offence intended to be charged, not only that the for
> mer may know what he is called upon to meet, bu
> that upon a plea of former acquittal or convictio
> the record may show with accuracy the exact offenc
> to which the plea relates." (p. 587.)

See, further,

> *Moore v. United States*, 160 U. S. 274;
> *United States v. Carll*, 105 U. S. 608, 613;
> *United States v. Simmons*, 96 U. S. 360;
> *United States v. Hess*, 124 U. S. 483.

We submit that the proper construction of the Act o
November 21, 1918, renders unlawful the manufacture
and sale of intoxicating liquors only, and that under th
rules of criminal pleading the allegations of the indict
ment are not sufficient to charge the defendant with th
manufacture of an intoxicating liquor. The District
Court was therefore correct in sustaining the demurrer
to the indictment.

WAS THE ACT OF NOVEMBER 21, 1918, CAPABLE OF BEING CONSTITUTIONALLY ENFORCED ON THE 4TH DAY OF JUNE, 1919?

The date upon which the indictment charges the alleged
offence to have been committed is the 4th day of June,
1919. This was seven months, lacking a few days, from
the signing of the Armistice between Germany and the
powers associated with the United States in the prosecu-
tion of the war, and after the President of the United
States had addressed Congress, in the course of which,
after reading the terms of the Armistice, he solemnly
stated: "The war thus comes to an end; for having

accepted these terms of armistice, it will be impossible for the German command to renew it."

Between the date of the signing of the Armistice and the date of the finding of this indictment, the terms thereof had been substantially complied with, and Germany and Austria had been in fact disarmed. The German navy had been surrendered and sunk. All hostilities had ceased immediately upon the day of the signing of the Armistice and for nearly seven months the United States had been with all possible speed demobilizing its army and its navy.

The President on May 20, 1918, had declared in his Message to the Congress:

> "The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers."

In view of these indisputable facts, the only ground upon which it can possibly be contended that the Act of November 21, 1918, was operative as of the date of this indictment, is that demobilization of the army had not been entirely completed. Such a contenton must go to this extreme: That notwithstanding the fact that hostilities have altogether ceased, that the enemies have been subdued and their empires disrupted, Congress retains the power to override the ordinary powers of the States, and subject the entire population of the country to regulations respecting their personal habits, prescribed by Congress, merely upon the ground that some part of the army raised to carry on war upon foreign soil has not been demobilized. But the contention goes even further. It means, if the construction of the statute advanced by the Government is correct, that Congress could not only at the time in question, and in the then peaceful state of the country, regulate the manufacture and sale of intoxicating liquor, but it had the power to regulate

the sale and manufacture of all non-intoxicating beverages as well. Every drink, no matter how nutritious and how absolutely devoid of all harmful properties it might be, would by this extension of power be brought within the regulatory power of Congress.

Certainly at a time when there is no existing emergency of war, there can be no constitutional warrant for the exercise of such a sweeping power by Congress, an exercise of power which is destructive of all the fundamental principles of our dual form of government.

No one denies the power of Congress to enlist every resource of men and treasure in the waging of a war in which it is engaged. But the mere existence of a technical state of war, or the mere doing of some particular thing consequent upon the termination of war cannot of itself justify the subversion of the state governments. When the United States is engaged in war, all impeding power of the States must give way. But there must be a conflict *in fact* between some *exercise* of power pursuant to war, and the ordinary powers of the states, before the powers of the latter are required to give way. Bearing in mind the dual nature of our government as recognized and perpetuated by the Constitution, is not something more than a *technicality* required to suspend or nullify the operation of those principles which lie at the very foundation of that form of government. Whatever may be said as to the extent of the power of Congress with respect to the regulation of the manufacture and sale of intoxicating liquor during the period when some actual operation having to do with the prosecution of war is in progress, it must always be a question whether even at such a time Congress can prohibit, upon the ground of general welfare and apart from some real and definite purpose having a substantial relation to the prosecution of war, the manufacture and sale of harmless non-intoxi-

cating beverages. The relation in such a case between a prohibition of that sort and the prosecution of war is so fanciful as scarcely to be regarded as a reasonable relation at all in the constitutional sense.

The doctrine of *Ex Parte Milligan*, 4 Wall. 1, we submit, is controlling here. It was there announced that,

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary for its existence; as has been happily proved by the result of the great effort to throw off its just authority" (p. 120).

The reserved rights of the States are as clearly and solemnly guaranteed by the Tenth Amendment, as the rights of liberty and property under the other amendments and provisions of the Constitution. These reserved rights can only be invaded or suspended in time of war when the Federal Government is actually exercising some authority with which the reserved powers of the States are in conflict. The conflict must be real, not imaginary, for the States cannot lightly be shorn of their just powers.

We submit that to hold that the Act of November 21, 1918, prohibits the manufacture and sale of non-intoxicating malt liquors would render that Act unenforceable as of June 4, 1919, the date named in the indictment as that upon which the alleged offence was committed.

But even if this Court should not agree with us in this, we submit that to adopt such a construction of the Act

would at least raise grave doubt as to the constitution
ality of the Act. This Court has said that,

> "A statute must be construed if fairly possible
> so as to avoid not only the conclusion that it is un
> constitutional, but also grave doubt upon that score."
>
> *United States v. Jin Fuey Moy*, 241 U. S. 394
> 401.
>
> *United States v. D. & H. Co.*, 213 U. S. 366.

The construction for which we have contended, we sub
mit, is not only the one which the language of the statut
demands, but is the one which should be adopted, becaus
the only other construction suggested, namely, that con
tended for by the Government, would raise a grave doub
with respect to the constitutionality of the Act.

CONCLUSION.

For the reasons above discussed it is submitted that
the indictment found in this case does not allege an
offence under the Act of November 21, 1918, and that the
judgment of the District Court of the United States for
the District of Maryland should be affirmed.

Baltimore, December 3, 1919.

WILLIAM L. MARBURY,
RANDOLPH BARTON, JR.,
WILLIAM L. RAWLS,
Counsel for Defendant in Error

APPENDIX A.

Act of Congress Approved November 21, 1918.

An Act to enable the Secretary of Agriculture to carry out during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes, provides in part as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any *distilled spirits,* and during said time no *distilled spirits* held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the *manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.* After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and threafter until the termination of demobilization, the date of which shall be determined and proclaimed by

the President of the United States, *no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.* The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act *no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States* during the continuance of the present war and period of demobilization: *Provided,* That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

"Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine: *Provided,* That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of this Act, *to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones,* and that any violation of the President's regu-

lations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment: *Provided further,* That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen (Public Numbered Forty, Sixty-fifth Congress)."

APPENDIX B.

PROCLAMATION AND EXECUTION ORDER of January 30, 1919, modifying proclamation of September 16, 1918, so as to permit the manufacture of beverages which are not intoxicating, viz.:

"Whereas, under and by virtue of an Act of Congress entitled 'An Act to Provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and . el,' approved August 10, 1917, the President, on the 16th day of September, 1918, made the following proclamation:

'Now, therefore, I. Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortgae of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods,

fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

"Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this thirtieth day of January in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of March 4th, 1919, further modifying proclamation of September 16th, 1918, so as to declare that "there is now an abundant supply" of food products, and limiting prohibition of food used in the production of intoxicating malt liquors for beverage purposes, viz.:

"Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President on the 16th day of September, 1918, made a proclamation containing the following prohibition:

'I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And, whereas, the President, under authority of the said act of August 10, 1917, by further proclamation dated January 30, 1919, modified the said proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, such proclamation providing as follows:

'Whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

'Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.'

"And whereas, for the production from a cereal base, of a non-intoxicating beverage, which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, but of which the use for such purposes is prohibited by the aforesaid proclamation of September 16, 1918, are required:

"Now, therefore, I, Woodrow Wilson, President of the United States, do hereby amend the aforesaid proclamation of September 16, 1918, by inserting in the first sentence of the prohibiting paragraph, after the words 'production of' the word 'intoxicating' and by striking out of the same sentence the words 'including near beer'; and by inserting in the succeeding sentence in both places where the phrase 'production of malt liquors' occurs, after the words 'production of' the word 'intoxicating,' and striking out the phrases 'including near beer' and 'whether or not such malt liquors contain alcohol' in both places in that sentence where these phrases occur, so that as amended the prohibitory provisions of said proclamation shall read as follows:

'That the use of sugar, glucose, corn, rice or any other foods, fruits, food materials and feeds in the production of intoxicating malt liquors for

beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made in the production of intoxicating malt liquors for beverage purposes, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, including malt, in the production of intoxicating malt liquors for beverage purposes, whether or not such malt liquors contain alcohol.'

and the aforesaid Proclamation of September 16, 1918, as thus amended, shall remain in full force and effect.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this 4th day of March in the year of Our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred and Forty-third.

(Signed) WOODROW WILSON.

FRANK L. POLK,
Acting Secretary of State."

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 474.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE AMERICAN BREWING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED AUGUST 1, 1919.

(27229)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 474.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE AMERICAN BREWING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	2	1
Notice of filing demurrer in open court	4	2
Demurrer of American Brewing Company	5	2
Judgment of the court sustaining demurrer	9	5
Motion and order for writ of error	10	5
Assignment of errors	11	6
Precipe for transcript	13	7
Clerk's certificate	14	8
Citation and service	15	8
Writ of error	17	9

1 United States of America, Supreme Court of the United States.

UNITED STATES, PLAINTIFF IN ERROR
vs.
AMERICAN BREWING COMPANY, DEFENDANT IN ERROR } No. 4506. (Criminal docket.)

Henry Mooney, United States Attorney, for the United States, plaintiff in error.

Messrs. John P. Sullivan, Lemle & Lemle, Edgar M. Cahn, Carroll & Carroll, Buck, Walshe & Buck, and Milling, Godchaux, Saal & Milling, for American Brewing Company, defendant in error.

Writ of error to the United States District Court for the Eastern District of Louisiana, New Orleans division, from the Supreme Court of the United States, returnable within thirty (30) days from the sixteenth (16th) day of July, A. D. 1919, at city of Washington, District of Columbia.

2 *Indictment filed July 15, 1919.*

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

United States District Court, Eastern District of Louisiana, New Orleans Division.

In the District Court of the United States, in and for the Eastern District of Louisiana, New Orleans division, at the May term thereof, A. D. 1919,

The grand jurors of the United States, empaneled, sworn and charged at the time aforesaid of the court aforesaid, on their oaths present that the American Brewing Company, a corporation organized under the laws of the State of Louisiana, at New Orleans, in the New Orleans division of the Eastern District of Louisiana, on the 26th day of June, 1919, wilfully and knowingly did unlawfully use certain grains, cereals, and other food products, to wit, five hundred pounds (500 lbs.) of malt, one hundred and ten pounds (110 lbs.) of hops, two thousand one hundred pounds (2,100 lbs.) of grits, and two hundred pounds (200 lbs.) of maltine, (the latter being sugar glucose), in the manufacture and production of a large quantity of beer, to wit, two hundred (200) barrels of beer, for beverage purposes, which said beer so manufactured and produced as aforesaid, then and there cantained as much as one-half (½) of one per cent (1%) of alcohol by both weight and volume; the termination of demobilization not being then and there determined
3 and proclaimed by the President of the United States; con-

trary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

(Signed) HENRY MOONEY,
United States Attorney.

A true bill.
New Orleans, La., July 15, 1919.
(Signed) ALFRED WILKENS, *Acting Foreman.*

(Endorsed on back:) No. 4506. United States District Court, Eastern District of Louisiana, New Orleans division. United States v. American Brewing Company. Indictment. Violation of the act of November 21, 1918. Filed July 15, 1919. (Signed) H. J. Carter, clerk. Henry Mooney, United States attorney.

4 *Notice of filing demurrer in open court, extract from the minutes.*

May term, 1919.

NEW ORLEANS, *Tuesday, July 15th, 1919.*

Court met pursuant to adjournment; present, Hon. Rufus E. Foster, judge.

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

This day, in open court, appeared John P. Sullivan and Lemle and Lemle, attorneys for the American Brewing Company, the accused herein, and interposed a demurrer on behalf of said defendant to the indictment herein;

Whereupon, it was ordered by the court that the said demurrer be filed.

5 *Demurrer of American Brewing Company. Filed July 15, 1919.*

In the District Court of the United States for the Eastern District of Louisiana.

UNITED STATES OF AMERICA
vs.
AMERICAN BREWING COMPANY. }

Demurrer.

American Brewing Company, the defendant herein, by its attorneys, demurs to the indictment herein and says that the same is bad in substance and insufficient in law.

And for grounds of said demurrer the defendant says:

1. That said indictment fails to allege the doing of anything or the commission of any act which is forbidden by or contrary to any law or statute of the United States.

2. Said indictment fails to allege sufficient facts to constitute a violation of any law or statute of the United States.

3. No law or statute of the United States forbids or makes unlawful or did forbid or make unlawful on July 15th, 1919, the use of grains or other food products, as alleged in the indictment, in the manufacture or production of beer for beverage purposes containing as much as one-half of one per cent of alcohol by both weight and volume.

4. The act or thing charged in the indictment is not forbidden or made unlawful by any law or statute of the United States unless the beer so produced is intoxicating, and the indictment fails to allege that the beer so made was in fact intoxicating.

5. The act of Congress of the United State approved November 21st, 1918, a violation of which is charged in the indictment, relates only to beer which is in fact intoxicating, and the indictment fails to allege that the beer manufactured was in fact intoxicating.

6 6. The aforesaid act of Congress does not make unlawful as charged in the indictment the use of food products in the manufacture of beer for beverage purposes "containing as much as one-half of one per cent of alcohol both by weight and volume"; it makes no reference to the percentage of alcohol contained, nor does it ever refer to the presence of alcohol, but makes the test solely whether the beer so made is or is not in fact intoxicating.

7. The aforesaid act of Congress is, so far as it may be construed to forbid the use on July 15th, 1919, of food products in the manufacture of beer for beverage purposes unconstitutional and void, in that Congress had at the time of the passage of the act no power to forbid such use or manufacture unless the same was necessary as a "war measure" for the public security, and on July 15th, 1919, no war affecting the United States was in progress, nor did any public necessity or emergency exist requiring or justifying such prohibition.

8. The aforesaid act of Congress relates, so far as it prohibits the use of food products in the manufacture of beer for beverage purposes, only to beer of the kind commonly supposed or understood to be intoxicating beer and beer containing as small a percentage of alcohol as that charged in the indictment, to wit, one-half of one per cent both by weight and volume, is not commonly supposed or understood to be intoxicating beer and is, therefore, not the kind of beer referred to in the act in question.

9. The aforesaid act of Congress of the United States approved November 21, 1918, provides that nothing therein shall be construed to interfere with the power conferred upon the President under section 15 of the food control act of August 10, 1917. In pur-

7 suance of the power conferred upon him by said food-control

act the President did, by his proclamations issued January 30, 1919, and March 4, 1919, permit the use of grain and food products in the manufacture of malt beverages which are not in fact intoxicating, and said act of November 21, 1918, therefore, does not prohibit and has not prohibited since the issuance of said proclamations the use of such grain or food products in the manufacture of beer or other malt liquor which is not in fact intoxicating.

10. The indictment undertakes improperly and without justification in law to define the kind of beer referred to in the act of Congress of the United States approved November 21, 1918, whose violation is charged in the indictment. The attempted definition is "beer containing as much as one-half of one per cent of alcohol both by weight and volume." No such definition is contained in or intended by or reasonably to be construed to be implied in the act in question, but said definition of "beer," as used in the said indictment, is based solely on the test or standard applied in laws or regulations relating solely to matters of revenue or taxation.

11. The aforesaid act of Congress approved November 21, 1918, applies only to "beer, wines, or other intoxicating malt or vinous liquors for beverages purposes"; the indictment fails to allege facts from which it may be reasonably understood or assumed that the beer referred to in the indictment was "an intoxicating liquor" and therefore fails to charge facts constituting a violation of the act.

12. The aforesaid act of Congress declared the "beer" therein referred to to be "an intoxicating malt liquor" and hence refers and was intended to refer only to the kind of beer which is "intoxicating beer," and the kind of beer set forth in the indictment, to wit, that containing "as much as one-half of one per cent of alcohol,"
8 not only is not alleged and can not be assumed to be "intoxicating," but in fact is and must be judicially recognized to be nonintoxicating, and therefore, is not the kind of beer referred to or prohibited by the act in question.

13. The aforesaid act of Congress, insofar as it forbids the use after May 1, 1919, of food products in the manufacture for beverage purposes of "beer, wire, and other intoxicating malt or vinous liquors," does not purport to be a food conservation statute, but a measure designed to conserve the man power of the Nation by preventing the use of intoxicants, and the indictment fails to allege any facts showing that the defendant manufactured for beverage purposes any intoxicating beer or intoxicant of any kind, or that the "beer" so made by it was or is of the kind referred to and intended to be reached by said act.

14. The aforesaid act of Congress approved November 21, 1918, insofar as it purports to apply to the production, manufacture or sale of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes is unconstitutional and void, because in excess of and unauthorized by any power delegated to or vested in the Congress or any department or officer thereof under and by virtue of the Constitution of the United States.

15. And for other grounds to be assigned at the hearing.

(Signed) JOHN P. SULLIVAN,
" LEMLE & LEMLE,
Attorneys for the Defendant, American Brewing Company.

(Signed) EDGAR M. CAHN,
" CARROLL & CARROLL,
" BUCK, WALSHE & BUCK,
" MILLING, GODCHAUX, SAAL & MILLING,
Of Counsel.

9 *Judgment of the court sustaining demurrer; extract from the minutes.*

May term, 1919.

NEW ORLEANS, *Tuesday, July 15th, 1919.*

Court met pursuant to adjournment; present: Hon. Rufus E. Foster, judge.

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

This cause came on this day to be heard upon the demurrer filed by the defendant to the indictment herein, and was argued by counsel for the respective parties;

Whereupon, and on due consideration thereof, it is ordered, adjudged, and decreed by the court that the said demurrer herein be, and the same is hereby, sustained, that the said indictment herein be quashed, and that the defendant, the American Brewing Company, be discharged without day in the premises.

10 *Motion and order for writ of error. Filed July 16, 1919.*

United States District Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
vs.
AMERICAN BREWING COMPANY. } No. 4506.

On motion of the United States herein appearing by Henry Mooney, United States attorney, and on suggesting error to the prejudice of the United States in the judgment rendered in this case on the 15th day of July, 1919, sustaining the demurrer filed in this case by the defendant, and on further suggesting the assignment of errors herein filed.

It is ordered that a writ of error be granted the United States, returnable within thirty days from this date to the Supreme Court

of the United States, at Washington, D. C., and that the said writ of error act as a supersedeas, and the United States be dispensed from giving bond on said writ of error.

(Signed) RUFUS E. FOSTER, *Judge.*

JULY 16, 1919.

11 *Assignment of errors. Filed July 16, 1919.*

United States District Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
v.
AMERICAN BREWING COMPANY. } No. 4506.

Assignment of errors.

Now comes the United States in this case praying for a writ of error and assigns the following errors in the proceedings, judgment, and decree of the trial court in this case, sustaining the demurrer of the defendant.

I.

The trial court erred in sustaining the demurrer to the indictment filed by the defendant.

II.

The trial court erred in not overruling and setting aside the demurrer filed by the defendant.

III.

That the trial court erred in its construction of the statute upon which this case is founded, and particularly in its construction and interpretation of the words "beer, wine, or other intoxicating malt and vinous liquor," in such statute, and in holding under its erroneous construction and interpretation of those words, that in order to charge an offense under the statute it is essential and sacramental to charge in the indictment that the "beer" manufactured out of the prohibited and named cereals, grains, and food products is "intoxicating beer."

IV.

12 That the court erred in its construction and interpretation of the words "beer, wine, or other intoxicating malt and vinous liquor" contained in the statute upon which this case is founded and in not holding that it was sufficient to charge in the indictment that the cereals, grains, and food products named therein

were, on the date specified, unlawfully used in the manufacture of "beer," for beverage purposes, without charging or setting out in the indictment that the "beer" so manufactured was "intoxicating beer."

And for these errors and others apparent on the face of the record, the United States of America prays that the said judgment of July 15, 1919, be reversed and the cause remanded for such other proceedings as may be proper, and that such other and further orders may be rendered as may be just.

(Signed) HENRY MOONEY,
United States Attorney.

13 *Præcipe for transcript. Filed July 24, 1919.*

United States District Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
v.
AMERICAN BREWING COMPANY. } No. 4506.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and defendant in error, through their attorneys, that the clerk shall include in the transcript of the record for the hearing of the writ of error herein sued out, the following:

I.

The indictment.

II.

The demurrer.

III.

The minute entry of the hearing, and the submission and judgment sustaining the demurrer.

IV.

The appeal papers.

(Signed) HENRY MOONEY,
United States Attorney for Plaintiff in Error.

(Signed) JOHN P. SULLIVAN,
(Signed) GUSTAVE A. LEMLE,
Attorneys for Defendant in Error.

(Signed) CARROLL AND CARROLL,
(Signed) MILLING, GODCHAUX & SAAL,
(Signed) BUCK, WALSHE & BUCK,
(Signed) EDGAR M. CAHN,
Of Counsel for Defendant in Error.

14 United States of America, District Court of the United States, Eastern District of Louisiana.

Clerk's office.

I, Henry J. Carter, clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 13 pages contain and form a full, complete, true and perfect transcript of the record, assignment of errors and proceedings in the case of the United States, versus American Brewing Company, No. 4506 of the criminal docket of the United States District Court for the Eastern District of Louisiana, New Orleans Division (made in accordance with the præcipe for transcript, copied at page 13 of said transcript).

Witness my hand, and the seal of said court, at the city of New Orleans, Louisiana, this 24th day of July, A. D. 1919.

[SEAL.] H. J. CARTER, *Clerk.*

15 *Issued for Henry Mooney, U. S. attorney.*

The United States of America, District Court of the United States, Eastern Division of Louisiana.

The President of the United States to the American Brewing Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Louisiana, wherein the United States is plaintiff in error and the American Brewing Company is defendant in error, in the cause entitled United States versus American Brewing Company, No. 4506 of the criminal docket of the United States District Court for the Eastern District of Louisiana, to show cause, if any there be, why the judgment rendered against the said United States as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus E. Foster, Judge of the United States District Court, at New Orleans, La., this 16th day of July, in the year of our Lord one thousand nine hundred and nineteen.

(Signed) RUFUS E. FOSTER, *Judge.*

Clerk's office: A true copy of the original. New Orleans, La., July 16th, H. J. Carter, clerk.

16 Received by United States Marshal, New Orleans, La.
July 17, 1919.

And on the 21st day of July, 1919, I served the original of which this is a certified copy on American Brewing Company, by handing same to Mr. E. G. Schlieden, president of said company, in person, in the city of New Orleans, La.

FRANK M. MILLER, *U. S. Marshal*,
By WALTER J. GRIFFIN, *Deputy*.

(Endorsed:) Return. United States District Court, Eastern District of Louisiana, No. 4506. United States vs. American Brewing Company. Citation on writ of error. Marshal's return. United States District Court, Eastern District of Louisiana, New Orleans Division. Filed July 24, 1919. H. J. Carter, clerk.

17 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable, the judge of the District Court of the United States for the Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States, plaintiff, and American Brewing Company, defendant, No. 4506 of the criminal docket of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, a manifest error hath happened, to the great damage of the said United States as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what, of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, this 16th day of July in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.]

H. J. CARTER,
Clerk of the United States District Court
for the Eastern District of Louisiana.

Allowed by: Rufus E. Foster, judge.

(Endorsed:) United States District Court. No. 4506. (Criminal docket.) United States versus American Brewing Company. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Filed July 16, 1919. E. Wendling, clerk.

(Endorsement on cover:) File No. 27229. E. Louisiana D. C. U. S. Term No. 474. The United States, plaintiff in error, vs. The American Brewing Company. Filed August 1st, 1919. File No. 27,229.

○

Office Supreme Court, U. S.
FILED
OCT 20 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919—No. 474.

UNITED STATES OF AMERICA,
Plaintiff-in-error,

v.

AMERICAN BREWING COMPANY,
Defendant-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

MOTION TO ADVANCE BY DEFENDANT-IN-ERROR.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for defendant-in-error.

Supreme Court of the United States.

OCTOBER TERM, 1919—No. 474.

UNITED STATES OF AMERICA,
Plaintiff-in-error,

v.

AMERICAN BREWING COMPANY,
Defendant-in-error.

IN ERROR TO THE DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

MOTION TO ADVANCE BY DEFENDANT-IN-ERROR.

Now comes the American Brewing Company, the defendant-in-error, and respectfully moves the advancement of the above-entitled cause for early hearing during the present term.

The cause is now pending in this court under a writ of error sued out by the Government under the provisions of the Criminal Appeals Act (34 Stat. 1246) to review a ruling sustaining a demurrer to an indictment found under the act of November 21, 1918 (40 Stat. 1045), forbidding the use of grains and other food products in the manufacture of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. The indictment alleged the use of certain grains and other food products in the manufacture of a quantity of beer containing as much as one-half of one per cent. of alcohol but did not allege that the liquor was intoxicating. A demurrer was interposed and sustained

because the indictment failed to allege that the beer in question was intoxicating, as required by the statute.

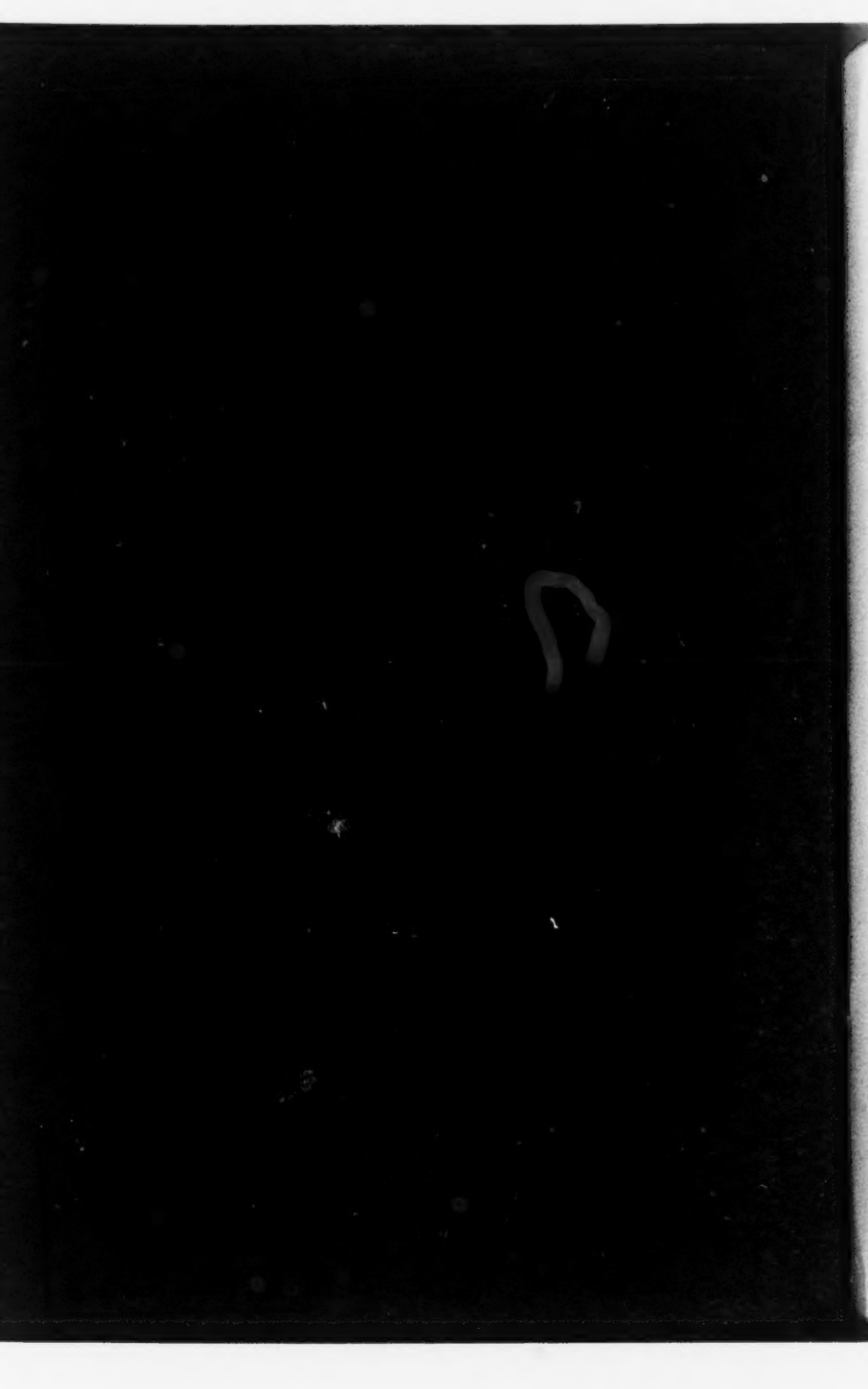
The case is similar to the case of *United States* v. *Standard Brewery, Incorporated,* October Term, 1919, No. 458, in which the Solicitor General has given notice of a motion to advance for early hearing, and it is desired that this cause be heard together therewith.

The question is one of general public importance and numerous cases now pending will be governed by the decision of the court herein. The Circuit Court of Appeals of the Second Circuit and the District Courts in the Southern District of New York, the District of Massachusetts, the District of Rhode Island, the District of Maryland, the Western District of Wisconsin, the Northern and Southern Districts of California and the District of Porto Rico have rendered decisions construing the statute in question in the same manner as the court below in the case at bar. The District Courts in the Western District of Pennsylvania and the Northern District of Illinois hawe ruled to the contrary. It is important, therefore, that an early decision be had in the case at bar.

Notice of this motion has been served on the Department of Justice.

October, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for defendant-in-error.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

UNITED STATES, PLAINTIFF IN ERROR,
v.
AMERICAN BREWING COMPANY,
No. 474.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR THE UNITED STATES.

This case arises under and involves the constitutionality and the construction of what is known as the war prohibition act of November 21, 1918 (40 Stat., c. 212, pp. 1045, 1046–7), which prohibits after May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, the use of grains, cereals, fruit, or other food product in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.

THE INDICTMENT.

The indictment charged that the defendant in error, while the prohibition in question was in effect, used certain grains, cereals, and other food products in the manufacture of beer containing as much as one-half of 1 per cent of alcohol by both weight and volume.

151235—19

THE DEMURRER.

A demurrer was filed challenging both the constitutionality of the statute and the construction which the Government put upon it. As to the latter, the demurrer was predicated upon the proposition that the act in question prohibited the manufacture only of such beer as was, in fact, intoxicating, and that since the indictment did not charge that the beer in question was intoxicating it charged no offense.

RULING OF THE COURT BELOW.

The court below sustained the demurrer without writing an opinion.

Government's contentions presented in cause No. 458, The United States of America v. Standard Brewery, Incorporated.

This case is to be heard at the same time as cause No. 458, *The United States of America* v. *Standard Brewery, Incorporated.* The questions involved are precisely the same in both cases. The Government's contentions have been fully presented in the brief filed in cause No. 458, and that brief is submitted on behalf of the Government in this case.

Respectfully submitted,

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

NOVEMBER, 1919.

○

Office Supreme Court, U. S.
FILED
DEC 8 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1919,

No. 474.

THE UNITED STATES OF AMERICA,
Plaintiff-in-error,

v.

THE AMERICAN BREWING COMPANY,
Defendant-in-error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel for defendant-in-error.

INDEX.

PAGE

Introductory matter 1

Statement 3

The prohibition rider to the agricultural appropriation act of November 21, 1918 3

The indictment 4

The true interpretation of the act of Congress of November 21, 1918 .. 6

The plain intent of the act of Congress of November 21, 1918, as disclosed in the act itself and in similar statutes 20

The intent of the act of Congress of November 21, 1918, as disclosed by its legislative history 35

As to the regulations or rulings of the Department of Internal Revenue. 40

The act of Congress of November 21, 1918, should be strictly construed. 44

Decisions of the lower federal courts interpreting the act of Congress of November 21, 1918 46

The terms "beer" and "intoxicating" in the act of Congress of November 21, 1918, considered and defined 63

As to the jurisdiction of this court 71

Conclusion 72

Appendix of proclamations and messages of the President:

Proclamation of December 8, 1917 73

Proclamation of September 16, 1918 75

Proclamation of January 30, 1919 77

Proclamation of March 4, 1919 79

Message of May 20, 1919 83

Message of October 27, 1919 83

TABLE OF CASES

PAGE

Alexander v. Greenup, 15 Va. 134 10
Andrews v. United States, 162 U. S. 420 12
Attorney-General v. Ayer, 148 Mass. 584 10
Blake v. National Banks, 23 Wall. 307 35
Blatz v. Rohrbach, 116 N. Y. 450 ..... 62, 68
Board of Commissioners v. Taylor, 21 N. Y. 173 ..... 66, 68
Brown v. State, 17 Ariz. 314 19
Bruce v. United States, 202 Fed. 98 43
Caminetti v. United States, 242 U. S. 470 38
City of Bowling Green v. McMullen, 122 S. W. 823 (Ky.) 11, 16
City of St. Paul v. Traeger, 25 Minn. 248 10
Coffin v. United States, 156 U. S. 432 6
Columbia L. Ins. Co. v. Tousey, 152 Ky. 447 71
Commonwealth v. Blos, 116 Mass. 56 67
Decker v. State, 39 Tex. Crim. 20 68
Dickenson v. Fletcher, (1873) L. R. 9 C. P. 1 45
Estes v. State, 166 Pac. 77 67
Ex parte Gray, 83 S. W. 828 (Tex.) 10
Extract & Tonic Co. v. Lynch, 100 Miss. 650 19
Fuller v. City of Jackson, 97 Miss. 237 ..... 17, 19
Gard v. State, 15 Oh. C. C. (n. s.) 255 70
Great Western Ry. Co. v. Swindon & Cheltenham Ry. Co., L. R. 9 App. Cas. 787 23
Gridley v. Northwestern Mut. L. Ins. Co., 14 Blatchf. 107, 100 U. S. 614 ..... 10, 15
Grimm v. United States, 156 U. S. 604 12
Hawaii v. Mankichi, 190 U. S. 197 29
Heintz v. Le Page, 100 Me. 542 68
Hough v. Windus, L. R., 12 Q. B. D. 214 10
In re Cuno, (1889) L. R. 43 Ch. Div. 12 45
In re Greene, 52 Fed. 104 5
In re Johnson, 224 Fed. 180 45
In re Lockman, 18 Idaho 465 19
Intoxicating Liquor Cases, 25 Kan. 751 66
Jacob Hoffmann Brewing Co. v. McElligott, 259 Fed. 321; *id.* 525. 19, 21, 27, 29, 31, 43, 47, 48, 60
Jacob Ruppert, a corporation v. Caffey et al., (Oct. Term, 1919, No. 603) 63
James v. State, 49 Tex. Crim. 334 68
Lafler v. Fisher, 121 Mich. 60 70
LaFollette v. Murray, 81 Oh. St. 474 17
Lawrence v. Allen, 7 How. 785 32
Leecy v. United States, 190 Fed. 289 43
Leisy Brewing Co. v. Atchinson, &c. R. Co., 225 Fed. 753 19

PAGE
Macbeth & Co. v. Chislett, [1910] A. C. 220 44
Market Co. v. Hoffman, 101 U. S. 112 7
Marks v. The State, 159 Ala. 71, 48 So. 864 ..... 18, 67, 68
Mason v. State, 1 Ga. App. 534 68
Minnesota Life Ins. Co. v. Link, 230 Ill. 273 11
Morrill v. Jones, 106 U. S. 466 43
Muir v. Louisville & Nash. R.R. Co., 247 Fed. 888 43
O'Connell v. State, 5 Ga. App. 234 70
O'Donnell v. Commonwealth, 108 Va. 882 70
Pacific Rolling Mill Co. v. Hamilton, 61 Fed. 476 10
Palmers' Case, (1784) 1 Leach C. C. (4th Ed.) 352 32
Pennell v. State, 141 Wis. 35, 123 N. W. 115 19
People v. Strickler, 25 Cal. App. 60, 142 Pac. 1121 ..... 10, 16
People v. Zeiger, 6 Park. Crim. 355 68
Pettibone v. United States, 148 U. S. 97 5
Potts v. United States, 114 Fed. 52 ..... 10, 14
Purity Extract Co. v. Lynch, 226 U. S. 192 30
Railroad Companies v. Schutte, 103 U. S. 118 61
Rohrer v. Hastings Brewing Co., 83 Neb. 111 32
St. Louis, I. M. & S. Ry. Co. v. Waters, 152 S. W. 137 (Ark.) 70
St. Louis Merchants Co. v. United States, 188 Fed. 191 43
Sapp v. State, 116 Ga. 182 70
Sarlls v. United States, 152 U. S. 570 ..... 45, 64
Sinclair v. Phœnix Mut. L. Ins. Co., 22 Fed. Cas. 195 ..... 10, 15
Smith v. People, 47 N. Y. 330 32
State v. Ely, 22 S. Dak. 487 18
State v. Gerhardt, 145 Ind. 439 32
State v. May, 34 Pac. 407 (Kan.) 67
State v. Nethken, 60 W. Va. 673 71
State v. Piche, 98 Me. 348 66
State v. Pierce, 65 Iowa 85 71
State v. Virgo, 14 N. D. 293 ..... 10, 16, 67
Taylor v. State, 49 S. W. 589 68
The Bothnea & The Jahnstoff, 2 Wheat. 169 6
Tiger v. Western Investment Co., 221 U. S. 286 32
Todd v. United States, 158 U. S. 278 5
Union Pac. Co. v. Mason City Co., 199 U. S. 160 61
United States v. American Brewing Co., (July 15, 1919, E. D. La.) 47
United States v. Bashaw, 50 Fed. 749, 152 U. S. 436 39
United States v. Bassett, 2 Story 389; 24 Fed. Cas. No. 14,539 9
United States v. Baumgartner, 259 Fed. 722 ..... 47, 51, 68
United States v. Bergner & Engel Brewing Co., (July 17, 1919, E. D. Pa.) 59
United States v. Carney, 228 Fed. 163 5
United States v. Carter, 231 U. S. 492 71
United States v. Chamberlin, 219 U. S. 250 61

PAGE
United States v. Chase, 135 U. S. 255.....10, 11, 12, 17, 59, 62
United States v. Clark, 43 Fed. 574..... 10
United States v. Cohn, 2 Ind. Ter. 474; 52 S. W. 39..... 17
United States v. Cruikshank, 92 U. S. 542..... 5
United States v. Fisher, 2 Cranch 358..... 9
United States v. George, 228 U. S. 14..... 43
United States v. Hess, 124 U. S. 483..... 5
United States v. James Hanley Brewing Co., (July 23, 1919, D. R. I.) 47, 50
United States v. Jin Fuey Moy, 241 U. S. 394..... 46
United States v. Keitel, 211 U. S. 370..... 2
United States v. Lacher, 134 U. S. 624..... 46
United States v. Lexington Mill Co., 232 U. S. 399..... 8
United States v. Loftis, 12 Fed. 671.....10, 12
United States v. Mason, 213 U. S. 115..... 2
United States v. Mohr, (Aug. 22, 1919, W. D. Wis.).....47, 54
United States v. Moist, 231 U. S. 701..... 71
United States v. Morehead, 243 U. S. 607..... 43
United States v. Nathan, 61 Fed. 936..... 13
United States v. Petts and Vogel, (July 15, 1919, D. Mass.).....47, 49
United States v. Pittsburgh Brewing Co., (July 15, 1919, W. D. Pa.). 58
United States v. Portale, 235 U. S. 27..... 2
United States v. Porto Rico Brewing Co., (Aug. 23, 1919, D. Porto Rico) 47, 56
United States v. Ranier Brewing Co., 259 Fed. 359.....47, 50
United States v. Reese, 92 U. S. 214..... 45
United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310..... 38
United States v. Salen, 235 U. S. 237..... 45
United States v. San Jacinto Tin Co., 125 U. S. 273..... 43
United States v. Schmauder, 258 Fed. 251.....60, 61
United States v. Southern Pac. Co., 230 Fed. 270..... 40
United States v. Standard Brewery, Inc. (July 1, 1919, D. Md.)...47, 49, 59
United States v. Standard Brewery, Inc., Oct. Term, 1919, No. 458. 41, 63, 64
United States v. Stenson Brewing Co., (July 25, 1919, N. D. Ill.)...55, 62
United States v. United Verde Copper Co., 196 U. S. 207..10, 13, 43, 59, 62
United States v. Valentine Blatz Brewing Co., (Oct. 14, 1919, E. D. Wis.) 47, 55
United States v. Williamson, 207 U. S. 425..... 43
United States v. Wilson, 58 Fed. 768..... 10
United States v. 11,150 Lbs. of Butter, 195 Fed. 657, 188 Fed. 157... 43
United States v. 200 Bbls. of Whisky, 95 U. S. 571..... 43
United States Condensed Milk Co. v. Smith, 116 App. Div. 15, 191 N. Y. 536 45
Wadsworth v. Dunnam, 98 Ala. 610..... 71
Waite v. Macy, 246 U. S. 606, 224 Fed. 359..... 43

Supreme Court of the United States,

OCTOBER TERM, 1919, No. 474.

THE UNITED STATES OF AMERICA,
Plaintiff in-error,

v.

THE AMERICAN BREWING COMPANY,
Defendant-in-error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

This writ of error presents for review a judgment of the District Court for the Eastern District of Louisiana sustaining a demurrer to an indictment attempting to charge a violation of the so-called Wartime Prohibition Act of November 21, 1918, being subdivision fourth of section 1 of the Agricultural Appropriation Act of that date (40 Stat. 1045, ch. 212). The court below delivered no written opinion. The defendant-in-error made a motion to advance the cause for early hearing, which was granted and the case advanced for argument on December 8, 1919.

The case at bar involves the interpretation of the above-mentioned portion of the act of November 21, 1918. The contention of the Government is that the prohibitions of

the statute, which are in terms applicable to "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," are to be construed as prohibiting *all* beer, whether intoxicating or not; while the contention of the defendant-in-error is that only *intoxicating beer* is prohibited. The latter view has been sustained by the Circuit Court of Appeals for the Second Circuit and ten district courts. The contrary view has been declared by two district courts and may be deemed to have some support in the opinions of two other district courts. The state of the decisions so far rendered on this question is considered more at length below.

The district court in the case at bar sustained the contention of the defendant-in-error that the act in question prohibited only intoxicating beer, and, as the indictment (p. 1) failed to charge that the beer alleged to have been unlawfully made was in fact intoxicating, quashed the indictment (p. 5). The construction of the statute was alone considered by the court and is alone assigned by the Government as error (p. 6), although the defendant in and by its demurrer (pp. 2-5) also challenged the constitutionality of the enactment. As under the rule established by this court, only the particular question decided in the court below can be reviewed on this appeal (*United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Mason*, 213 U. S. 115, 122; *United States* v. *Portale*, 235 U. S. 27, 31), the discussion in this brief is confined to the question of interpretation.

STATEMENT.

The so-called prohibition rider to the Agricultural Appropriation Act of November 21, 1918, read as follows (40 Stat. 1046):

> "That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the ap-

proval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided*, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

"Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine: *Provided*, That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of this Act, to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment: *Provided further*, That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen (Public Numbered Forty, Sixty-fifth Congress)."

The indictment found under this statute by the grand jurors at New Orleans charged that (p. 1)—

"The American Brewing Company, a corporation organized under the laws of the State of Louisiana, at New Orleans, in the New Orleans division of the Eastern District of Louisiana, on the 26th day of June, 1919, wilfully and knowingly did unlawfully use certain grains, cereals, and other food products, to wit, five hundred pounds (500 lbs.) of malt, one

hundred and ten pounds (110 lbs.) of hops, two thousand one hundred pounds (2,100 lbs.) of grits, and two hundred pounds (200 lbs.) of maltine, (the latter being sugar glucose), in the manufacture and production of a large quantity of beer, to wit, two hundred (200) barrels of beer, for beverage purposes, which said beer so manufactured and produced as aforesaid, then and there contained as much as one-half (½) of one per cent (1%) of alcohol by both weight and volume; the termination of demobilization not being then and there determined and proclaimed by the President of the United States; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States."

It will be observed that this indictment charges nothing more than that in June of this year the defendant used food products in the manufacture of beer for beverage purposes and that this beer contained one-half of one per cent. of alcohol. It does not allege that beer with such an alcoholic content is intoxicating, and, of course, if that fact be material, it may not be presumed. The rule of criminal pleading is well settled that, if any essential element of the alleged crime is omitted in an indictment, such omission cannot be supplied by intendment or implication. *Pettibone* v. *United States*, 148 U. S. 197, 202; *United States* v. *Hess*, 124 U. S. 483, 486; *Todd* v. *United States*, 158 U. S. 278, 282. The averments that the defendant "did *unlawfully* use certain grains," etc., and that that was "contrary to the form of the statute in such case made and provided," etc., are mere conclusions of the pleader and not facts, and, therefore, are of no avail. *United States v. Cruikshank*, 92 U. S. 542, 558; *In re Greene*, 52 Fed, 104, 111; *United States* v. *Carney*, 228 Fed. 163, 165.

Since it is well-established law that where facts alleged

are susceptible of two interpretations, one of which points to guilt and the other to innocence, "a court of justice has no alternative; it must pronounce in favor of innocence" (*The Bothnea & The Jahnstoff*, 2 Wheat. 169, 177; *Coffin* v. *United States*, 156 U. S. 432), it follows that it must be presumed that the half per cent beer referred to in the indictment was non-intoxicating. Certainly the courts cannot judicially know what particular percentage of alcohol will render a given kind of beer intoxicating. Indeed, it would be far more reasonable to ask the court to take judicial cognizance of the indisputable fact that half of one per cent beer is not as matter of fact intoxicating.

I.

THE TRUE INTERPRETATION OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918.

The question of statutory interpretation presented for adjudication under the act of Congress of November 21, 1918, is whether or not Congress, by use of the phrase "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," intended to include non-intoxicating beer and wine. On the one hand, the contention of the Government is that the words "beer" and "wine" must be interpreted without relation to what follows, as including all beer and wine whether intoxicating or not, and that they must be given effect as if they stood alone and were not immediately followed by the phrase "or other intoxicating malt or vinous liquor." The result of this interpretation necessarily would be that the word

"other" would be wholly disregarded and ignored, and the clause interpreted and enforced as if it read in each instance—

> "beer, wine, or . . . intoxicating malt or vinous liquor for beverage purposes."

On the other hand, the contention of the defendant-in-error is that the word "other" must, if possible, be given significance and effect, and that, as it may be accorded an apt and intelligible purpose, it cannot be ignored or disregarded.

Under the interpretation urged by the defendant-in-error, the word "other" serves a distinct purpose, namely, to carry back and apply the defining or qualifying term "intoxicating" to the immediately preceding antecedent words "beer" and "wine," and to mark them with the common quality thus indicated, thereby importing that each must be "intoxicating." In other words, the defendant-in-error contends that, according to a settled rule of statutory interpretation, effect must, if possible, be accorded to every word in a statute, that such a word as "other" cannot be treated as superfluous, void or insignificant, and that its use must be assumed, if possible, to indicate a definite purpose on the part of Congress. The rule is stated in *Market Co.* v. *Hoffman*, 101 U. S. 112, 115, by Mr. Justice Strong, speaking for the court, as follows:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented,

> no clause, sentence, or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

To same effect is *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 410.

It must be manifest that no significance or effect whatever can be given to the word "other" in the statutory clause now before the court for interpretation except by holding that it indicates an intent on the part of Congress to affix the quality of "intoxicating" to the preceding words "beer" and "wine" and to require each of them to have that common quality as an essential element of the crime created by the statute.

If Congress had intended to prohibit beers and wines, whether intoxicating or not, it would clearly not have employed the word "other," and would have made the clause read:

> "beer, wine, or intoxicating malt or vinous liquor for beverage purposes."

But as Congress was dealing only with the subject of intoxicating liquors, it naturally qualified or defined the words "beer" and "wine" by connecting the defining word "intoxicating" with the two words immediately preceding, through and by the use of the relative adjective "other." Thus, instead of using the expression "intoxicating beer and wine or other intoxicating malt or vinous liquor," it adopted the simpler and equally expressive and comprehensive form "beer, wine, or *other intoxicating* malt or vinous liquor," although the briefer

mode of expressing such an intent might have been "all intoxicating malt or vinous liquor."

The mere fact that under this interpretation the words "beer" and "wine" do not serve any separate purpose that would not be comprehended within the phrase "intoxicating malt or vinous liquor" does not warrant the disregard of the word "other." The use of unnecessary words has long been quite common in statutes and even constitutions (*United States* v. *Bassett*, 2 Story 389, 404, 24 Fed. Cas. No. 14,539). In *United States* v. *Fisher*, 2 Cranch 358, 387, Chief Justice Marshall, discussing somewhat analogous phraseology, said:

> "On the phraseology of this act it has been observed, that there is a circuity of expression, which would not have been used if the intention of the legislature had been to establish its priority in all cases whatever. Instead of saying 'any revenue officer, or other person hereafter becoming indebted to the United States,' the natural mode of expressing such an intent would have been, 'any person indebted to the United States'; and hence it has been inferred that debtors of a particular description only were in the mind of the legislature.
>
> "It is true the mode of expression which has been suggested, is at least as appropriate as that which has been used; but between the two there is no difference of meaning, and it cannot be pretended that the natural sense of words is to be disregarded, because that which they import might have been better, or more directly expressed."

Whenever an expression is used which enumerates several things and concludes with a descriptive and comprehensive defining phrase containing the word "other" and embracing the remainder of the class, the tautology noted by Chief Justice Marshall occurs. Thus, the com-

mon statutory expression, in use by Congress for half a century, viz., "beer, lager beer, ale, porter or other fermented liquor," meant and means no more than the shorter expression "fermented liquor." But no one would seriously suggest that, in the illustration mentioned, the word "beer" should be held to be something other than a "fermented liquor," because, if a fermented liquor merely, the whole intention might have been more tersely expressed. "Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous" (Lord Coleridge, C. J., in *Hough* v. *Windus*, L. R. 12 Q. B. D. 224, 229). The tautology in such expressions is common and inherent in the formula of speech which is employed, and it affords no warrant whatever for denying significance and effect to the word "other."

The construction urged by the defendant-in-error is supported by the decisions of this court and numerous other courts. *United States* v. *Chase*, 135 U. S. 255, 258, 259; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 213; *United States* v. *Loftis*, 12 Fed. 671, 673; *United States* v. *Clark*, 43 Fed. 574; *United States* v. *Wilson*, 58 Fed. 768, 770; *Potts* v. *United States*, 114 Fed. 52, 54; *Pacific Rolling Mill Co.* v. *Hamilton*, 61 Fed. 476, 477; *Gridley* v. *Northwestern Mut. L. Ins. Co.*, 14 Blatchf. 107, affirmed 100 U. S. 614; *Sinclair* v. *Phoenix Mut. L. Ins.*, 22 Fed. Cas. 195; *People* v. *Strickler*, 25 Cal. App. 60, 66, 142 Pac. 1121, 1123; *State* v. *Virgo*, 14 N. D. 293, 295; *Attorney-General* v. *Ayer*, 148 Mass. 584, 586; *Ex parte Gray*, 83 S. W. 828, 829 (Tex.); *Alexander* v. *Greenup*, 15 Va. (1 Munford) 134, 144; *City of St. Paul* v. *Traeger*,

25 Minn. 248, 253; *Minnesota Life Ins. Co.* v. *Link,* 230 Ill. 273, 278; *City of Bowling Green* v. *McMullen,* 122 S. W. 823, 825 (Ky.).

The case of *United States* v. *Chase,* 135 U. S. 255, directly rules the point of statutory interpretation that, in such a form of phrasing as is now presented for interpretation, the word "other" must be interpreted as urged by the defendant-in-error. In that case the court was called upon to interpret the act of Congress of July 12, 1876 (19 Stat. 90), which prohibited the use of mails for "every obscene, lewd, or lascivious book, pamphlet, picture, *paper, writing,* print or *other publication* of an indecent character." The indictment charged the sending of a *sealed* and addressed letter of an indecent character through the mails. Among the questions presented for decision was whether the words "or other publication" qualified and defined the preceding words "paper" and "writing" and marked each with the common quality of "publication" as an essential element of the crime, and thus excluded sealed private letters not in fact published. It was held that, according to a well-defined rule of construction, the words "other publication" related back and qualified or defined the words preceding them, and, consequently, that only "published papers" and "published writings" were within the statute. Mr. Justice Lamar delivering the unanimous opinion of the court, among other things, said (pp. 258, 259):

> "In the statute under consideration, the word 'writing' is used as one of a group or class of words, —book, pamphlet, picture, paper, writing, print,— each of which is ordinarily and *prima facie* understood to be a publication; and the enumeration con-

> cludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated.
>
> "It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

The earlier case of *United States* v. *Loftis*, 12 Fed. 671, likewise arose under the act of Congress of July 12, 1876, and presented a question similar to that before this court in the *Chase* case. In a ruling to the same effect, District Judge Deady reasoned as follows (p. 673):

> "Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a 'publication.' This word 'writing' occurs in an enumeration of things—books, pamphlets, pictures, prints, and papers—which *ex vi termini* are *prima facie* publications.
>
> "The general phrase with which the enumeration ends, 'or other publication of an indecent character,' impliedly asserts that the things before enumerated are publications. The expression 'John and James and other men' is one in which, by a necessary implication, it is asserted that John and James are men."

After the *Chase* case had arisen, but prior to its decision by this court, the act of Congress of July 12, 1876, was amended by the act of September 26, 1888 (25 Stat. 496, c. 1039), so as expressly to insert the word "*letter*" in the list of prohibited publications and add the provision "*whether sealed as first-class matter or not.*" It was thereupon held that the statute as amended applied to the mailing of a private sealed letter. *Grimm* v. *United States*, 156 U. S. 604, and *Andrews* v. *United States*, 162

U. S. 420. Whilst in neither of these cases, nor in most of those decided in the district courts arising under the act of 1888, is any reference made to the phrase "*whether sealed as first-class matter or not*,"* such amendment could not, of course, have been disregarded, for it undoubtedly was made by Congress for the express purpose of changing the meaning as adjudged and of declaring that thereafter sealed as well as unsealed letters should be deemed included within the prohibition of the statute as amended.

In *United States* v. *United Verde Copper Co.*, 196 U. S. 207, the court interpreted a provision of the act of Congress of June 3, 1878 (20 Stat. 88, c. 150), permitting the use of timber on the public lands for "building, agricultural, mining and other domestic purposes," and it was called upon to decide whether the word "other" could be disregarded and the statute made to read as if that word had not been used; in other words, whether the adjective phrase "other domestic" qualified the preceding words. Mr. Justice McKenna delivering the opinion of the court among other things said (at p. 213):

> "Counsel for the Government recognizes this, and substitutes for 'domestic' the word 'household,' and contends that the word 'other' should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for 'building, agricultural, mining or *domestic* purposes.' But we are not permitted to take such liberty with the statute, if 'domestic' has a meaning consistent with the intentional use of the word 'other.' It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may

* See, however, *United States* v. *Nathan*, 61 Fed. 936, at p. 937.

> properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state or nation, according to the object in contemplation. So in the statute the word 'domestic' applies to the locality to which the statute is directed, and gives permission to the industries there practised to use the public timber. This definition of 'domestic' gives the word an apt and sensible meaning, and we must regard the association of the word 'other' with it as designed, not as accidental."

It is evident that this court then interpreted the word "other" in the act of 1878 as designedly used to connect the defining term "domestic" with the preceding words, including the word "mining," and that it held that, so interpreted, the intent of the statute was to authorize the use of timber for the purpose of "domestic mining." The syllabus of the report states the substance of the decision as follows:

> "An apt and sensible meaning must be given to words as they are used in a statute and the association of words must be regarded as designed and not as accidental, nor will a word be considered an intruder if the statute can be construed reasonably without eliminating that word."

In *Potts* v. *United States*, 114 Fed. 52, the Circuit Court of Appeals for the Ninth Circuit had before it for interpretation the act of Congress (23 Stat. 321), providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means*, shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands. Speaking for the court, Circuit Judge Morrow used the following language (at p. 54):

> "By a well-known rule of construction the words 'or any other unlawful means,' in describing and

> giving scope to the prohibited acts, relate back to and qualify the preceding words 'fencing' and 'inclosing,' so that those words must be read as 'unlawful fencing' and 'unlawful inclosing.' "

In *Gridley* v. *Northwestern Mutual Life Ins. Co.*, 14 Blatchf. 107, 108, affirmed 100 U. S. 614, an insured was asked the question: "Have [your] parents, uncles, aunts, brothers or sisters been afflicted with consumption, . . . insanity, . . . or any *other hereditary* disease?" to which he replied: "No hereditary taint of any kind in family." The company claimed that an uncle of the insured had had insanity, but failed to prove that the insanity was hereditary. The court ruled that the defense was insufficient on that account; in other words, it was held that the word "other" in the phrase "or any *other* hereditary disease" carried back the term "hereditary" and thereby qualified each of the preceding nouns, District Judge Benedict saying:

> "It may be that the diseases enumerated in the question are not in all cases hereditary, but all of them sometimes take the form of hereditary diseases; and the word 'other' to my mind, plainly indicates that the question was intended to be an inquiry whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease."

This court affirmed the above interpretation and held that it was necessary to show, not only that the alleged insanity of the uncle had existed, but that it was hereditary. See also to the same effect, *Sinclair* v. *Phœnix Mut. L. Ins. Co.*, 22 Fed. Cas. 195.

It is, therefore, submitted that it is proper to assume that when Congress used the phrase "beer, wine, or *other*

intoxicating malt or vinous liquor," it knew that, according to a well-defined rule of construction, the words "other intoxicating" would operate to mark the words "beer" and "wine" with the common quality of being "intoxicating"; and it must reasonably follow that such is the intention to be attributed to the lawmakers.

There are adjudications in the state courts to the same effect. In *City of Bowling Green* v. *McMullen*, 122 S. W. 823, 825, the Court of Appeals of Kentucky declared that a non-intoxicating malt liquor did not come within the meaning of a statute relating to "spirituous, vinous, malt or other intoxicating liquors." In *State* v. *Virgo*, 14 N. Dak. 293, 295, it was held that an act covering "all spirituous, malt, vinous, fermented or other intoxicating liquors," affected only liquors which were actually intoxicating and no others. And in *People* v. *Strickler*, 142 Pac. 1121, 1123 (Cal.), it was adjudged, in respect of a statute providing that "the term alcoholic liquors. . . shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contains 1 per cent. by volume, or more, of alcohol," that the final words, "any other liquor or mixture of liquors which contains 1 per cent. by volume, or more, of alcohol," related back to and qualified the particular words preceding them, so that no malt liquor with less than one per cent. of alcohol came within the prohibition, the court refusing to approve the argument that "by the specific enumeration in said section of spirituous, vinous and malt liquors, the legislature intended such liquors to fall under its ban regardless of whether they do or do not contain alcohol."

In a number of the authorities ordinarily cited in oppo-

sition to these views, the result is to be explained by difference in language or the history of the legislation. Thus, in the case of *United States* v. *Cohn*, 2 Ind. Ter. 474, 52 S. W. 38, it was the legislative history of the enactment that was determinative. In the prior statute "ale and beer" had been absolutely prohibited, and, as the court observed, it was the evident intent of the subsequent revision "to include in the new law that which was excluded by the old," not to omit what was included in the old. It should, furthermore, be noted that the decision was by a divided court, and that neither counsel nor the judges cited the *Chase* case or, so far as appears, even knew of it.

Moreover, the double disjunctive in the statute in the *Cohn* case—"vinous, malt *or* fermented liquors, *or* any other intoxicating drinks"—prevented that compactness of expression and unity of thought which are to be found in the statute now before the court. This is likewise true of the statute in *Fuller* v. *City of Jackson*, 97 Miss. 237, where the use of several disjunctives operated to break the sentence up into distinct and independent parts covering distinct classes of liquors.

In the case of *La Follette* v. *Murray*, 81 Oh. St. 474, the legislative history, and not the usual meaning of the statutory language involved, was the *ratio decidendi*. The statute there laid a tax "upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors." In the prior act the word "any" had stood where the word "other" now was. The court held, upon consideration of the legislative history of the law, that the legislature had intended no change in effect by sub-

stituting "other" for "any." Similar considerations are applicable to *Marks* v. *The State*, 159 Ala. 71, 48 So. 864, and *State* v. *Ely*, 22 S. Dak. 487.

The *Marks* case, moreover, involved, a statute quite different in important particulars from the one here under discussion. It prohibited the sale of "alcoholic, spirituous, vinous *or* malt liquors, intoxicating bitters *or* beverages *or other* liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication." It will be observed that no qualifying or defining adjective is placed between the word "other" and the word "liquors" in this act as in the act of November 21, 1918, and that the form of the clause is not a compact unity, but is broken into several independent parts by the repeated use of the disjunctive "or." The word "other" is not defined or qualified, but is used in the sense of additional, and an apt and sensible meaning is accorded to it by recognizing that the preceding enumerated substances are "liquors or beverages," and it was not, therefore, necessary to hold that the phrase, "which if drunk to excess will produce intoxication," following the words "liquors or beverages," modified any terms but those nearest to them. In the act of November 21, 1918, however, the adjective "other" immediately adjoins the word "intoxicating" and both therefore necessarily relate back to the preceding words as qualifying them, and, if the word "other" is to have any effect or significance, it must serve to connect the defining or qualifying word "intoxicating" with the preceding words "beer" and "wine." The interpretation of such a statute as that involved in the *Marks* case furnishes no precedent for

the present case. A similar distinction applies to the cases of *Fuller* v. *City of Jackson*, 97 Miss. 237, 253; *Extract & Tonic Co.* v. *Lynch*, 100 Miss. 650, and *in re Lockman*, 18 Idaho 465.*

In *Brown* v. *State*, 17 Ariz. 314, the statute related to "ardent spirits, ale, beer, wine, or intoxicating liquor of any kind." The word "other" was not employed. Manifestly that decision has no bearing at all upon the question now presented. The same is true of *Pennell* v. *State*, 141 Wis. 35, 123 N. W. 115, and *Leisy Brewing Co.* v. *Atchison &c. R. Co.*, 225 Fed. 753.

The detailed consideration of the opinions heretofore delivered in the lower federal courts construing the act of Congress of November 21, 1918, is postponed (see pp. 46-62), but it may be stated here that District Judge Augustus N. Hand was clearly right when, in the first of these cases—*Jacob Hoffmann Brewing Co.* v. *McElligott*, 259 Fed. 321, 337,—he sustained the contentions now urged by the defendant-in-error and announced the following conclusion after a thorough consideration of the subject:

> "If the rule of *noscitur a sociis* is ever to be employed as a canon of construction, it is applicable in the present case, where the close relation of the qualifying word and the compactness of the whole clause render the interpretation I have given almost inevitable. In no clause where the relation of the

* In this case the statute covered "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, *including* bitters and other drinks that may be used as a beverage and produce intoxication." The use of the word "including" before "other drinks," etc., indicated that the clause immediately following that word was not used for the purpose of limiting or modifying what preceded it, but rather to add to the classes of beverages to be affected by the statute.

> word 'intoxicating' is as close as here, both spacially and grammatically, has a decision been reported prohibiting non-intoxicating malt liquors.
>
> "I think it can be fairly said that the general rules of construction enunciated by the United States courts bear out the interpretation of the statute which I have arrived at. The results which the state courts have reached in interpreting their liquor laws have been most divergent, but their decisions furnish abundant authority for the construction I have adopted, and the reasons for it appearing in the act itself seem to me most convincing."

In these views he was emphatically sustained by all the Circuit Judges in the Circuit Court of Appeals. Thus Circuit Judge Ward said (259 Fed. at p. 529):

> "We concur in the construction of the statute by the court below."

Circuit Judge Hough declared the interpretation urged by the Government to be a "strained construction" (*id.* at p. 542), and Circuit Judge Rogers said (*id.* at p. 541):

> "I am unable to see any escape from the conclusion that Congress in enacting the law had in mind intoxicating liquors. In that conclusion I agree with my associates."

II.

The plain intent of the act of Congress of November 21, 1918, as disclosed in the act itself and in similar statutes.

Aside from the grammatical and legal import of the words of the clause in question when read in the light of settled rules of statutory interpretation and current use of language, the declared purpose of the enactment as a war measure and the context of the words in question

furnish evidence that it was the intention of Congress to prohibit only actually intoxicating liquors by the so-called "prohibition rider" annexed to the Agricultural Appropriation Bill which became the act of November 21, 1918. The title of the act affords no aid. It reads (40 Stat. 1045):

> "An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes."

The prime object of the rider and the only purpose declared in its text are stated as follows:

> "for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy."

The conservation of food products was already fully covered by the act of August 10, 1917, and the presidential proclamations of December 8, 1917, and September 16, 1918, issued thereunder, all then still in full force and effect.

It must be evident that whilst the conservation of manpower or increase of efficiency in production of supplies for the army and navy might be directly promoted by prohibiting the manufacture and sale of intoxicating liquors, such conservation would not be promoted or efficiency in production increased by prohibiting non-intoxicating liquors. Undoubtedly it was appreciated by Congress, as stated by District Judge Augustus N. Hand in *Jacob Hoffmann Brewing Co.* v. *McElligott,* 259 Fed. at pp.

332-3, that the great increase of production of grains and other food products which had occurred by the autumn of 1918 would induce or compel the President to relax the ban placed thereon by him under the act of August 10, 1917, and it is probable that Congress intended that, no matter how abundant the supply of food products might be or become, the manufacture and sale of intoxicating beverages should, nevertheless, be prohibited.

Let us now analyze the enactment itself. Its first prohibition is that "it shall be unlawful to sell for beverage purposes any *distilled spirits*, and during said time no *distilled spirits* held in bond shall be removed therefrom for beverage purposes except for export." The expression employed is "distilled spirits," not "intoxicating distilled spirits," and the reason is manifestly because there are no non-intoxicating distilled spirits. The first prohibition of the statute is, therefore, directed against intoxicants solely and exclusively.

Then follow the two prohibitions under consideration herein, and they are limited to "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." The compactness of form of this clause indicates that it was intended to define and bring together within its scope but a single class with common qualifications, and the thought expressed is not in any wise divided or interrupted so as to raise several and distinct classes of liquors. The very last words of the phrase, "for beverage purposes," indisputably relate back to the beginning of the clause and define and modify both of the words "beer" and "wine," as well as the intermediate expression "other intoxicating malt or vinous liquor," to which

they are immediately adjoined. This is but in accordance with a well-settled rule of construction aptly expressed by Lord Bramwell in *Great Western Railway Co.* v. Swindon & Cheltenham Railway Co., L. R. 9 App. Cas. 787, 808, as follows:

> "As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all."

There is, therefore, in this phrase "for beverage purposes" a compulsion upon the mind of the reader to turn back and regard it as relating to and defining all the words of the clause. It was quite evidently not intended to interfere with beer or wine for medicinal or sacramental purposes or for any other than "beverage purposes." Indeed, the statute expressly provides as follows:

> "The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury. . . in regard to the manufacture, sale, or distribution of wine for sacramental, medicinal, or other than beverage uses."

And this compulsion upon the mind in respect to the reaching back and qualifying effect of the words "for beverage purposes" is emphasized by the intermediate expression "or other intoxicating malt or vinous liquor" which immediately follows the words "beer, wine." The word "other" necessarily connects and binds into even closer relation the words which precede and follow it than does the terminal expression "for beverage purposes" which we have just noticed. To repeat, unless intoxicating beer and intoxicating wine are intended, the word

"other" becomes useless and meaningless in this clause, as we have seen, and the entire expression becomes the equivalent of the clause "beer, wine, or intoxicating malt or vinous liquor," a combination of words which is not employed anywhere in the act, which is wholly different in meaning and effect, and which, in a word, was not enacted.

If not only intoxicating beer, but all beer was intended to be banned, as the Government now asserts, then it is plain that the indictment in the case at bar should have unqualifiedly alleged that the defendant had made "beer." But the Government realized that, in truth, all beer could not have been intended to be prohibited by Congress. Clearly spruce beer, root beer, ginger beer, weiss beer and numerous other well-known non-intoxicants called "beer," were never meant to be prohibited. The argument is, however, that, not these beers, but only *malt* beer was in the mind of Congress. If that be so, it can only result because of the defining and limiting effect of the phrase "other intoxicating *malt* or vinous liquor"; and, manifestly, if the word "malt" in this phrase relates back and qualifies the word "beer," the adjoining word "intoxicating" in the same phrase must likewise relate back and qualify the same antecedent.

The clause in the statute which follows the prohibitions just discussed deals solely with "distilled spirits," and, therefore, only with intoxicating liquors.

The succeeding clause reads as follows:

> "After the approval of this act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization."

It is evident that this was intended to be the counterpart of the prior prohibitions which were aimed at "distilled spirits" and "beer, wine, or other intoxicating malt or vinous liquor." If the Government's method of construing this statute were correct, then since November 21, 1918, it has been and is now illegal to import into the United States *any* malt or vinous liquor that is non-intoxicating. But it is submitted that this view of the statute probably occurred to no officer of the Government before the present controversy arose. Neither the conservation of food or of man-power, nor efficiency in production, could reasonably warrant the prohibition of the importation of non-intoxicating malt or vinous liquors.

It is noteworthy that this clause prohibiting the importation of "distilled, malt, vinous, or other intoxicating liquors," affords another illustration of the use of unnecessary words by Congress. The phrase quoted could, of course, have been more briefly expressed by the words "intoxicating liquors," but Congress saw fit to employ a common formula of speech which inherently involves some surplusage. Its plain intent is, however, not to be frustrated on that account.

If it be said that this clause as to importations is different in construction and effect from the preceding clause and that Congress intended to prohibit the importation of intoxicating liquors only, the conclusion would be that Congress intended to permit the importation of non-intoxicating beer or wine whilst prohibiting the manufacture and sale thereof in the United States. Is it not unreasonable to assume that Congress had any such intention, and is it not far more reasonable to conclude that in

both cases it was dealing with and prohibiting intoxicating liquors only?

The next clause relating to prohibition is the one empowering the President—

> "To establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and . . . he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of *intoxicating liquor* in such zones."

Only "intoxicating liquor" is here mentioned, and this, too, at the very point where it was of the highest importance to the conduct of the war that the production, sale, or distribution of beverages that might be at all harmful should be prohibited to the utmost degree. *According to the contention of the Government, Congress intended that within these vital zones non-intoxicating malt and vinous beverages could be freely produced, sold and distributed, and, of course, sold and distributed to the miners, munition workers, ship-builders, etc., who were within these zones; but that in every other place in the United States, however remote from these zones, non-intoxicating beer, even of a kind which the President has in terms declared to be "nutritious and palatable," could not be made and sold at all!*

If in such zones all beverages, regardless of alcoholic content, had been prohibited, while outside only intoxicating beverages had been forbidden, the differentiation would have been within reason. But the conclusion to which the contention of the Government leads would be

plainly unreasonable and makes manifest that the truth is that the statute throughout all its prohibitions only intended to reach and condemn intoxicating beverages, and hence consistently dealt in all its parts solely with intoxicating liquors.

It was urged by the Government in the New York cases that the differences between the clauses of the act relating to importation and zone districts on the one hand, and those relating to the manufacture and sale of beverages on the other hand, were natural and necessary because the former would go into effect immediately while the latter only in May and July thereafter. But the explanation is not persuasive. If the prohibition of non-intoxicating beverages was deemed necessary in the prosecution of the war in order to conserve man-power and increase efficiency in the production of arms, ships and munitions, then, obviously, such beverages could not be kept out of the country too soon, nor withheld too early from the reach of those working or serving within the war production zones. District Judge Hand has refuted this argument in the following passage of his opinion in the *Hoffmann* case (259 Fed. at p. 332):

> "Is it likely that Congress would fail to empower the President to prohibit all beer of every kind in these important zones, if it had thought it necessary in the earlier provisions of the act to prevent subterfuge by excluding non-intoxicating beer? If the total prohibition of non-intoxicating malt liquors was essential after June 30th, it apparently was more vital in the interval between. Indeed, peace might be concluded and the army demobilized before any result would ensue which might be obtained by such an indirect aid in the suppression of alcoholic drinks as the prohibition of non-intoxicating liquors.

> "It is to be remembered that when the act was passed there was a presidential proclamation in existence prohibiting brewing of malt liquors; that thereafter the President, by reason of the abundance of grain, relaxed this restriction and limited it to non-intoxicating liquors. Is it likely, in view of these circumstances, that Congress did exactly the opposite, and started with a law more liberal than the proclamation in force, and ended, after much of the need of conservation would be likely to have lessened, with an absolute prohibition of non-intoxicating beer, while the President issued proclamations of an opposite character? Both in the acts and in the proclamations of the President, when there is intended to be prohibition of any beverage, the words are clear and unmistakable."

The final clause of the enactment is the following proviso:

> "*Provided further*, that nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the Food-Control Act, approved August tenth, nineteen hundred and seventeen."

This proviso clearly indicates the intention of Congress to interfere as little as possible with the President's power to regulate beverages for the purpose of food conservation under the act of August 10, 1917. The President has by his proclamations dated January 30 and March 4, 1919, and still in force, permitted "the manufacture of beverages which are not intoxicating." It must, therefore, be manifest that to construe the act of November 21, 1918, as wholly prohibiting the use of food products in the manufacture of non-intoxicating beverages (with certain unimportant exceptions) would be "to interfere with the power conferred upon the President by section fifteen of the Food Control Act" to the largest

possible extent and, therefore, in direct contravention of the declared purpose of the proviso.

The construction urged herein is not only according to the natural import of the language used and the subject-matter being dealt with by Congress, but it avoids the unjust discrimination between non-intoxicating beverages which must otherwise ensue. *Hawaii* v. *Mankichi*, 190 U. S. 197, 214. Under the contention of the Government any non-intoxicating malt or vinous liquor, so long as it is not a beer or a wine, would be unprohibited, including non-intoxicating ale, porter and stout, whilst non-intoxicating beer and wine would be forbidden. Such a construction of the law would create want of uniformity, as well as a discrimination which finds no justification either in the purpose to conserve food or in the purpose to foster efficiency in conducting the war. As District Judge Hand pointed out (259 Fed. at pp. 332-3):

> "The prime object [of the rider in the act of November 21, 1918] was not to prevent unnecessary consumption of grain, which was already guarded against by the act of August 10, 1917, but to increase the production of all things, including grain, which might contribute to national efficiency by prohibiting intoxicants. Congress evidently feared that the prohibition of intoxicating liquors, which was sought to be covered by the act of August 10, 1917, and the presidential proclamations in relation thereto, might be relaxed by the President if he should come to feel that as a measure to conserve grain a drastic inhibition of the use of it for brewing could not logically be longer defended. Under these circumstances, Congress, as I think, passed an act by virtue of its war power preventing after about six months the manufacture or sale of intoxicating liquors, in order 'to increase efficiency . . . in production' irrespective of whether or not there should be any need

> of unusual abstention in the use of grain already produced. Any other interpretation of the act, not only does violence to the natural meaning of the words, but is utterly inconsistent with the fact that malt liquors, such as ale, stout, and porter, are by no possibility prohibited unless they are intoxicating. To single out non-intoxicating beer for prohibition, and leave non-intoxicating ale, stout, and porter to be manufactured and sold, would involve a construction of the act too unreasonable to be entertained."

Had Congress contemplated that the determining characteristic of the prohibited liquor should not be its intoxicating quality but merely whether it was a "beer," and that grain would be equally wasted whether such beer contained much or little alcohol, then *all* malt liquors and not beer merely, would have been prohibited. But Congress expressly provided the contrary: it forbade only "*intoxicating* malt liquors." If, as a prohibition statute to conserve man-power, Congress conceived that it was just as necessary to forbid beverages of small alcoholic content as beverages of large alcoholic content, then, too, the statute would have forbidden *all* malt and vinous liquors, in addition to beer and wine, and not saved as harmless all other non-intoxicating malt and vinous beverages. And, finally, if for the practical enforcement of the law it was necessary to bar *all* subterfuges, then again the enactment failed to accomplish that purpose, for it does not, as did the statute involved in *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204, prohibit *all* malt liquors, but only such of them as are intoxicating.

It should also be pointed out that the cases which, like the *Purity Extract Co.* case, have sustained laws forbidding non-intoxicants along with intoxicants, dealt with

statutes whose terms were plainly and unambiguously expressed and clearly directed towards that end, and not with language so ill-suited to that purpose as that here under consideration. The prohibition was not left to implication or ambiguous phrasing. As Judge Hand declared in the *Hoffmann Brewing Co.* case (259 Fed. at p. 331):

> "Such a suppression of a drink confessedly harmless in itself cannot be implied from general language prohibiting intoxicating liquors."

Moreover, whenever Congress has intended any such drastic prohibitory and sweeping result, it has always employed words which placed the matter beyond all doubt. Thus, in legislating for Alaska (act of Feb. 14, 1917, ch. 53, 39 Stat. 903), Congress provided that—

> "Whenever the term 'liquor,' 'intoxicating liquor' or 'intoxicating liquors' is used in this act it shall be deemed to include whisky, brandy, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, and *all malt liquors*," etc.

And in legislating for the District of Columbia (act of Mar. 3, 1917, ch. 165, 39 Stat. 1123) it provided that—

> "Whenever the term 'alcoholic liquors' is used in this act it shall be deemed to include whisky, rum, gin, wine, ale, porter, beer, cordials, hard or fermented cider, alcoholic bitters, ethyl alcohol, *all malt liquors*, and all other alcoholic liquors."

If, therefore, Congress had intended that any peculiar, strained, or artificial meaning should be given the words used in the act of November 21, 1918, it would certainly have defined them accordingly. Indeed, an extreme bill (H. R. 14,915) was in fact introduced into the 65th Congress "to define intoxicating liquors" where that term

was employed in federal legislation, as including "all liquors containing alcohol in any degree whatsoever," *but it was not enacted.*

A perusal of the Congressional legislation on this subject will further disclose that, although Congress when legislating for a particular locality may, out of consideration for local conditions* (like those affecting the Indians), adopt more stringent rules, yet when it legislates generally for the whole country its public policy, as disclosed in and by its enactments, deals prohibitively with intoxicants solely. Recourse to this legislation *in pari materia* as an aid to construction is, of course, permissible. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306, 309; *Lawrence v. Allen*, 7 How. 785, 793; *Smith* v. *People*, 47 N. Y. 330, 339; *State* v. *Gerhardt*, 145 Ind. 439; *Rohrer* v. *Hastings Brewing Co.*, 83 Neb. 111, 116; *Palmers' Case* (1784), 1 Leach C. C. (4th ed.) 352, 355. Thus, the Selective Service Law (act of May 18, 1917, ch. 15, 40 Stat. 76) forbade any person to "sell, supply, or have in his possession any intoxicating or spirituous liquors at any military station, cantonment, camp," etc.; empowered the Secretary of War to make regulations for "the sale and use of intoxicating liquors for medicinal purposes," and declared it unlawful "to sell any intoxicating liquor" to any soldier in uniform. The Food Control Law (act of August 10, 1917, ch. 53, 41 Stat. 2761), which is specifically referred to in the proviso of the act of November 21, 1918, and is clearly *in pari materia*

* E. g., section 15 of the act of August 10, 1917, permits the President to license the production of vinous and malt liquors in general, but the proviso thereto excepts from this power any right so to do in a locality "where the manufacture of such vinous or malt liquor is prohibited."

therewith, is an act for the conservation of productive efficiency, as well as a food conservation act, and contains contrasting provisions with regard to intoxicating and non-intoxicating liquors. It forbids absolutely the use of food materials for the production of distilled spirits for beverage purposes, and it forbids absolutely the importation of any distilled spirits. As stated above, all distilled spirits are intoxicating. The statute deals quite differently, however, with malt or vinous liquors for beverage purposes. As these may not be intoxicating, the right to regulate and limit the use of food stuffs in their production is entrusted to the President to deal with as circumstances may dictate. And his proclamations under this act have carefully distinguished between intoxicants and non-intoxicants.

His first proclamation of December 8th, 1917, permitted the use of food materials in the manufacture of beer containing not to exceed 2.75 per cent. of alcohol by weight, and brought into being and general use the so-called "war-beer" or non-intoxicating beer which is involved in other cases now before the court. It cannot be reasonably doubted that the President, in fixing this standard, acted with circumspection and upon due advice of competent experts. His last two proclamations, dated respectively January 30 and March 4, 1919, and promulgated after the passage of the act of November 21, 1918, have construed that enactment as it is construed herein, and, accordingly, in deference to its policy, the President permitted brewers to use all kinds of food products in any quantities for the manufacture of *non-intoxicating* beverages, there being now, as the President has found and pro-

claimed, an abundance of all food materials. These proclamations are printed in full in the appendix to this brief.

Finally, as to the general public policy of Congress, it should be recalled that the Eighteenth Amendment to the Constitution proposed by the same Congress in December, 1917, is expressly limited to "intoxicating liquors."*

The consistency and uniformity with which the Congress and the President, and now the legislatures of the various states in ratifying the Eighteenth Amendment, have joined in distinguishing, for all purposes of prohibition in federal laws, between intoxicating and non-intoxicating beverages, is most significant and persuasive. The attempt of the Government to spell out of the language of the act of November 21, 1918, a departure from this public policy and a condemnation of a lawful business, declared by the President to be desirable, by forcing upon the plain terms of the statute a strained and artificial meaning and a forced implication, violates every rule of construction. Certainly crimes ought not to be raised and otherwise lawful business be struck down and destroyed without any compensation whatever, except under the compulsion of the plainest and most unmistakable statutory language. No such language is to be found in the statute now before the court for construction.

---

* See also Acts of May 23, 1918, ch. 84 (41 Stat. 560), May 25, 1918, ch. 86 (41 Stat. 561), and July 1, 1918, ch. 113 (41 Stat. 634, 665), and Joint Resolution of September 12, 1918, ch. 170 (41 Stat. 958).

III.

THE INTENT OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918, AS DISCLOSED BY ITS LEGISLATIVE HISTORY.

The legislation resulting in the act of November 21, 1918, was primarily and principally an Agricultural Appropriation Bill. As originally drafted, it contained no provisions whatever concerning the prohibition of intoxicating liquors; but thereafter the so-called prohibition rider was tacked on to it. This rider was debated and framed and took its final form before the Armistice of November 11, 1918, was signed, and it was never debated or amended thereafter. It was drafted while the war was flagrant, and would probably have been enacted long before November 21, 1918, had it not been but a small part of an appropriation act whose other provisions engaged the attention of Congress for a considerable period. It was passed on November 21, 1918, notwithstanding the Armistice, because it was part of a bill providing appropriations necessary to the Government. Its legislative history, which may properly be referred to in order to shed light upon the intent of Congress (*Blake* v. *National Banks*, 23 Wall. 307, 319), strongly supports the construction hereinbefore urged.

Thus, on May 21, 1918, the subject covered by the rider was first brought before the House of Representatives by an amendment offered by Mr. Randall (Cong. Rec. p. 7400). This amendment had two purposes: (1) to make it "unlawful during the existence of the war with Germany to use any food or food materials in the manufacture or preparation of *alcoholic* beverages," and (2) to deny to

the administrative officers of the Government any part of the appropriation for agricultural purposes made in the act until the President had under the act of August 10, 1917, proclaimed an absolute prohibition against the use of foodstuffs "in the production of malt or vinous liquors for beverage purposes" (Cong. Rec. p. 7402). The debate on this amendment shows that it was intended by its sponsors to cover both intoxicating and non-intoxicating liquors (Cong. Rec. p. 7403). In the Senate the Jones amendment was substituted for this one, but its prohibitions were also directed against non-intoxicants. It expressly covered "malt or vinous liquors for beverage purposes" (Cong. Rec. p. 8191).

But neither of these forms was enacted. The so-called Sheppard amendment succeeded them, and was finally adopted, plainly because Congress would not agree that all malt liquors, whether intoxicating or not, should be banned by its direct legislative act or that the President should be coerced into proclaiming a prohibition against all such beverages in violation of his better judgment. Towards that specific end Congress used the language "beer, wine, or other *intoxicating* malt or vinous liquor," and inserted the proviso already quoted, to the effect that nothing should interfere with the powers of the President under the act of August 10, 1917 (Cong. Rec. p. 10,475). The following extracts from the Congressional Record are typical of the debate upon the subject held on May 21 and July 10, 1918 (Cong. Rec. pp. 7403, 9702):

> Rep. Overmeyer: "Will the gentleman state whether or not cereals are used in the manufacture of non-intoxicating liquors such as Bevo and Pablo?" . . . .

Rep. Caraway: "I understand they are."

Rep. Obermeyer: Does the gentleman's amendment prohibit the manufacture of those things?"

Rep. Caraway: "Yes, anything in which any food products are used in the making or brewing of its products. I do not believe in these times of shortage of grain that people should be permitted to make millions of gallons of Bevo." . . . .

Rep. Stafford: "This amendment can be considered only in one attitude and that is, a direct reflection and criticism of the President of the United States in the administration of authority that was granted to him as to the control of food in the manufacture of maltous beverages. The President has control of that situation in a practical way. He has reduced the amount of alcoholic content that may be utilized in beer or near-beer, and now it rests with the gentleman from California, who, I assume, pretends to be a friend of the administration, to come here and direct a slap at the President in his administration of this most troublesome question. . . .

"This is a reflection, a direct reflection, upon the President. . . . I am perfectly content to leave this great problem in the hands of the President. He has solved it in a practical way. The country is not complaining of his solution of it. He has reduced the amount of alcoholic content that may be used in the manufacture of beer now to 2½ per cent., I believe. In Canada they regard beer containing only 2½ per cent. of alcohol as a temperance beverage. And throughout the country we have the like maltous beverage containing 2½ per cent. or less of alcohol, but now as a fetish the few would put aside the practical solution and create dissension among industrial workers by refusing them their light beer. The alternative of their proposal is to favor whisky and bar beer." . . . .

Sen. Reed: "So, Mr. President, at the present time, by the express act of Congress, and as a part of the war legislation, the President of the United States is vested with plenary power to immediately prohibit, if he deems it for the public welfare, or in

> the interest of the prosecution of this war, the manufacture or sale of a single additional particle of liquor of any kind. . . . In other words, a moderate and temperate and wise discretion ought to be used. We vested that power in the President. He has reduced the alcoholic content of those liquors. He has proceeded along a line which has made for temperance. He has the power under the law as it stands to-day to absolutely prohibit; and I say that the wise thing to do is not to endeavor to force his hand, is not to endeavor to coerce and compel him. The wise thing to do is to trust the President upon this matter."

The subsequent proceedings in the same Congress also disclose that it intended the act of November 21, 1918, to deal with intoxicating liquors only. Thus, under date of February 26, 1919, the Judiciary Committee of the House of Representatives submitted a report* (No. 1143) in respect of a bill expressly for the purpose of providing machinery for the enforcement of the act of November 21, 1918, in which it described that act in the following language (pp. 2-3):

> "As part of the so-called food-stimulation act, approved November 21, 1918, the Congress adopted legislation prohibiting the manufacture and sale, after June 30, 1919, of *intoxicating liquors* for beverage purposes. . . . It simply prescribes a penalty for the manufacture and sale of *intoxicating liquors* for beverage purposes."

And although the committee in discussing this enactment repeatedly referred to it as dealing with intoxicants, it nowhere even once suggested that the statute related to any non-intoxicants whatever.

* A congressional report upon proposed legislation may be referred to by the courts as an aid in determining the proper construction of a statute. *Caminetti* v. *United States*, 242 U. S. 470, 490; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318.

At the extra session of the 66th Congress the committee again reported to the House of Representatives (Rep. No. 91, June 30, 1919) in reference to the act of November 21, 1918, and again characterized it as dealing with intoxicating liquors, and did not even suggest that the act affected non-intoxicating beverages of any kind.

Subsequently and on October 28, 1919, Congress enacted over the President's veto title I of the so-called National Prohibition Act which in terms purported "to provide for the enforcement of war prohibition," and in section 1 declared that—

> "The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act [i.e., the act of November 21, 1918] shall be *hereafter* construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume."

Manifestly this amendment recognized that theretofore the words, thus legislatively redefined for the future alone, had had a different meaning. The amendment in question was enacted in order to overcome the effect of the ruling of the many courts which had held, as did the court below in the case at bar, that the unamended act of November 21, 1918, prohibited only actually intoxicating beer. Of course, Congress would not have made this amendment if the act of November 21, 1918, already applied to *all* beer and wine, whether intoxicating or not. "It is a fundamental rule of construction that . . . when a previous statute is amended by an alteration of the terms used therein, it is to be presumed that it was the intent to alter the meaning of the previous act in that particular." *United States* v. *Bashaw*, 50 Fed. 749, 753,

reversed on other grounds, 152 U. S. 436; *United States* v. *Southern Pac. Co.*, 230 Fed. 270, 274.

IV.

As to the regulations or rulings of the Department of Internal Revenue.

From the time of the Civil War Revenue Act (July 13, 1866, 14 Stat. 164, sec. 48), taxable liquors have been described as "beer, lager beer, ale, porter, or other similar *fermented* liquor by whatever name such liquor may be called," with very little change in language until 1917. The Revenue Act of 1917 (40 Stat. 311, 312, sec. 307 and subd. b. of sec 313) for the first time described two groups of taxable liquors as follows: (1) "Beer, lager beer, ale, porter, and other similar fermented liquor, *containing one-half per centum or more of alcohol*, . . . by whatever name such liquors may be called," and (2) "unfermented grape juice, soft drinks or artificial mineral waters (not carbonated), and *fermented* liquors *containing less than one-half per centum of alcohol.*" Section 608 of the present tax law (act of February 24, 1919, 40 Stat. 1109) is in every material respect identical with the first of these two tax groups.

The taxing statutes prior to the Revenue Act of 1917 did not contain any reference whatever to one-half of one per cent. or, indeed, any percentage of alcohol. The limitation was first introduced in that act. If we apply to these taxing statutes the Government's contention that the word "beer" means *every* kind of beer regardless of

alcoholic content, it would necessarily follow that during the many years prior to 1917 the Treasury Department constantly misconstrued the revenue acts and failed to collect vast sums in taxes upon taxable commodities, since it consistently held during all that period that malt liquors with less than one-half per cent. of alcohol were not taxable at all, either as beer or as fermented liquor, and so held even where the beverage itself was commercially known as and called a "beer." See T. D. 1345 (April 18, 1908); T. D. 1360 (May 19, 1908); T. D. 2354 (August 2, 1916); T. D. 2359 (Sept. 9, 1916); T. D. 2410 (Dec. 8, 1916).

The Government's assertions in its brief filed in the *Standard Brewery* case, No. 458, that the Internal Revenue Department has defined "beer" as a substance with an alcoholic content of one-half of one per cent. and that that department of the Government has for a long time made that percentage of alcohol the test of an intoxicating beverage, are unfounded and entirely erroneous. The Internal Revenue Department has never been called upon or authorized to define the word "beer," and its rulings do not purport to do so. Under the taxing acts above referred to, the department has had to decide only whether a beverage was a "*fermented liquor*" in order to determine its taxability, and that, in sum, is the effect, and all the effect, of its decisions.

Moreover, it clearly appears that heretofore the Department of Internal Revenue has never been under any duty to decide for any purposes of taxation whether a beverage was intoxicating and has not even pretended so to do. Thus, in Treasury Decision No. 892 (April 26,

1905), in reply to a distinct inquiry upon this subject, the department wrote as follows:

> "Gentlemen: Your letter of the 19th instant has been received, relating to a beverage made from malt or from some substitute for malt, and fermented, and stating that 'the question arises frequently among brewers, what is the limit of alcoholic content that makes the beverages intoxicating—that is to say, from the legal point of view.'
>
> "The intoxicating character of such a beverage is important and material under the prohibitory liquor laws of a State or Territory, but, is not material under the Internal Revenue Laws of the United States. A fermented liquor made from malt,—for example, weiss beer—may contain so small an amount of alcohol, (say, 1½ or 1 per cent. or less) as to entitle it to be regarded as 'non-intoxicating' under the local prohibitory laws, but this fact does not relieve the brewer of this beverage from the necessity of giving bond and paying special tax as a brewer under the Internal Revenue Laws of the United States, as well as paying tax on this beer."

Again, in Treasury Decision No. 804 (June 29, 1904) the department declared that—

> "The question whether a fermented malt liquor is intoxicating or non-intoxicating is immaterial under the Internal Revenue Laws."

But on February 6, 1919, the Commissioner of Internal Revenue issued an attempted regulation to the effect that—

> "Within the intent of the Act of November 21, 1918, a beverage containing one-half of 1 per cent. or more of alcohol by volume will be regarded as intoxicating."

This regulation was plainly illegal and void. No statute authorized the Commissioner or any other officer to determine what was or was not an intoxicating liquor within

the meaning of the act of November 21, 1918. Congress had delegated that power to no one. It was a matter to be determined by court or jury in a proper case as the evidence might disclose. Indeed, in the *Hoffmann Brewing Co.* case (259 Fed. 321, 525), which directly challenged the validity of this alleged regulation of the Commissioner, the defendants, the Collector of Internal Revenue and the United States attorney, both admitted in their respective verified answers—

> "That the Commissioner of Internal Revenue is not and has never been authorized by law to determine what beverage is intoxicating, or what alcoholic content, if any, is required to render a beverage intoxicating, within the meaning of the act of November 21, 1918."

The regulation referred to, therefore, was an utterly unwarranted attempt by an official to add restrictions to those imposed by law, and thus, by mere administrative fiat, to convert into crimes conduct which Congress had never denounced as illegal. The nullity of such an interference is settled by numerous authorities.*

It should, furthermore, be borne in mind that, even if Congress had defined the term "beer" or "intoxicating liquor" as any fermented liquor containing one-half of one per cent. of alcohol for the purposes of the taxing acts,

---

* *Waite* v. *Macy*, 246 U. S. 606, 608, affirming 224 Fed. 359, 362; *United States* v. *Morehead*, 243 U. S. 607, 614; *United States* v. *George*, 228 U. S. 14, 25; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 307; *Morrill* v. *Jones*, 106 U. S. 466, 467; *United States* v. *Williamson*, 207 U. S. 425, 461; *United States* v. *200 Barrels of Whisky*, 95 U. S. 571, 576; *Muir* v. *Louisville & Nash. R.R. Co.*, 247 Fed. 888, 895; *Bruce* v. *United States*, 202 Fed. 98, 103; *United States* v. *11,150 Lbs. of Butter*, 195 Fed. 657, 663; 188 Fed. 157, 160; *Leecy* v. *United States*, 190 Fed. 289, 292; *St. Louis Merchants Co.* v. *United States*, 188 Fed. 191, 195.

it would, nevertheless, not follow that that definition was applicable to the act of November 21, 1918, which is not a tax act and which does not, either expressly or impliedly, refer to any other act as definitive of its plain terms. Nothing could be more far-fetched than the reasoning which assumes that because Congress may have used such a definition for the purposes of certain particular acts relating to the taxation of *fermented*, not *intoxicating*, liquors, which acts are not referred to in or made a part of the act of November 21, 1918, it must be presumed to intend the same test as to the operation of other laws not relating to the subject of taxation. The fallacy in this mode of reasoning was strongly condemned in the opinion of Lord Chancellor Loreburn in *Macbeth & Co.* v. *Chislett*, [1910] A. C. 220, 223, when he spoke as follows in the House of Lords:

> "It would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone."

V.

THE ACT OF CONGRESS OF NOVEMBER 21, 1918, SHOULD BE STRICTLY CONSTRUED.

Even if it could reasonably be claimed that the construction contended for by the defendant-in-error was doubtful, it is submitted that it should, nevertheless, be adopted. It is manifest that the legislation in question is in derogation of the common law and common right, as well as of the reserved police powers of the several states. It would practically destroy what has always here-

tofore been a lawful business without any compensation whatever, and would do so by an extraordinary exercise of federal legislative power in a matter still within the jurisdiction of the states alone. It would deprive many of the states of a present source of large revenue from license fees and other forms of taxation. It is a criminal law. It is highly restrictive of personal liberty—not only of the liberty of the defendant and of the states, but as well of the liberty of the public with whom the defendant deals. It is an ostensible exercise of war power at a time when the war, if not at "an end," as the President has proclaimed, was in fact—whatever it may be in legal contemplation—wholly won and all but legally terminated, and the country was without any war necessity or emergency confronting it to justify any such legislation. And, finally, the statute is, in truth, not necessary to accomplish any legitimate war purpose; since under section 15 of the so-called Lever Act of August 10, 1917, the President is vested with plenary power, expressly reserved to him by the proviso in the act of November 21, 1918, itself, to deal with the use of food materials for the manufacture of malt or vinous liquors for beverage purposes, as the war situation might from time to time require. Under these circumstances such a statute should be strictly construed. *United States* v. *Salen*, 235 U. S. 237; *In re Johnson*, 224 Fed. 180, 183; *Sarlls* v. *United States*, 152 U. S. 570, 574; *United States* v. *Reese*, 92 U. S. 214, 219; *United States Condensed Milk Co.* v. *Smith*, 116 N. Y. App. Div. 15, 19, affirmed 191 N. Y. 536; 36 Cyc. 1179-1180; *Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1, 7; *In re Cuno* (1889), L. R. 43 Ch. Div. 12, 17.

As there is at least grave doubt as to the constitutionality of the statute, it should, therefore, be construed so as to avoid the destruction without just compensation of the large property interests involved. As Mr. Justice Holmes declared in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score."

This rule of construction is peculiarly applicable to the act of November 21, 1918, where the ordinary meaning of the words used would call for a construction limiting the prohibition to intoxicating liquor and thereby avoid the destruction of property and business interests at a time when the President has declared that no war necessity warrants any further "ban upon the manufacture and sale of wines and beers" of any kind (see messages of May 20, 1919, and October 27, 1919, in appendix). If it still be true, as it unquestionably is, that "there can be no constructive offences, and [that] before a man can be punished, his case must be plainly and unmistakably within the statute" (*United States* v. *Lacher*, 134 U. S. 624, 628), it is submitted that no crime has been charged against the defendant-in-error in the case at bar.

VI.

DECISIONS OF THE LOWER FEDERAL COURTS INTERPRETING THE ACT OF CONGRESS OF NOVEMBER 21, 1918.

The construction urged by the defendant-in-error herein has been sustained by the Circuit Court of Appeals for the Second Circuit and ten district courts.

Jacob Hoffmann Brewing Co. v. *McElligott*, 259 Fed. 321, 330 (S. D. N. Y., A. N. Hand, D. J., and Mayer, D. J.), unanimously affirmed upon this point, 259 Fed. 525, 529, 541-2 (C. C. A., 2nd Cir., Ward, Hough and Rogers, C. JJ.); *United States* v. *Standard Brewery*, decided July 1, 1919, D. Md., Rose, D. J.; the case at bar which was decided without opinion, July 15, 1919, by Foster, D. J., E. D. La.; *United States* v. *Petts and Vogel*, decided July 15, 1919, D. Mass., Anderson, Cir. J.; *United States* v. *James Hanley Brewing Co.*, decided July 23, 1919, D. R. I., Brown, D. J.; *United States* v. *Ranier Brewing Co.*, 259 Fed. 359, 360 (N. D. Cal., Sawtelle, D. J.); *United States* v. *Baumgartner*, 259 Fed. 722 (S. D. Cal., Bledsoe, D. J.); *United States* v. *Mohr*, decided August 22, 1919, W. D. Wis., Sanborn, D. J.; *United States* v. *Porto Rico Brewing Co.*, decided August 23, 1919, D. Porto Rico, Hamilton, J.; *United States* v. *Valentine Blatz Brewing Co.*, decided without opinion, October 14, 1919, E. D. Wis., Geiger, D. J.

In none of the criminal cases above cited did the Government allege that the respective defendants had manufactured or sold intoxicating beer, or even "beer" unqualifiedly; all that was alleged in each case was that the defendant had manufactured or sold beer containing one-half of one per cent. of alcohol. This unvarying course of pleading by the Government in at least 14 instances conclusively shows that the Government would not rest upon the alleged meaning or effect of the word "beer," but sought to add to the act a definition or test of alcoholic content without alleging that it was intoxicating and thereby avoid tendering that issue of fact for trial. In-

deed, in none of the district courts has the Government been willing to try the issue whether beer containing even 2.75 per cent. of alcohol by weight (seven times one-half of one per cent. by volume) was or was not intoxicating.

The first of these cases—*Hoffmann Brewing Co.* v. *McElligott, supra*—was fully argued on behalf of the Government and carefully considered, and District Judge Augustus N. Hand held therein "that the act only prohibits the manufacture and sale of beer that is in fact intoxicating" (259 Fed. at p. 338). His opinion, which has already been referred to above, is too long to quote here, but its essential points may be summarized as follows:

> 1. That if the word "beer" as used in the statute did not signify only "intoxicating beer," no meaning would then be given to the word "other" directly preceding the phrase "intoxicating malt or vinous liquor for beverage purposes," and the entire provision would be rendered inconsistent and the meaning of the words forced and unnatural.
>
> 2. That Congress was dealing with the subject of intoxicating liquor, and that its prime object was, not to prevent the unnecessary consumption of food, which was already adequately guarded against by the act of August 10, 1917, but to conserve man power and efficiency.
>
> 3. That the contrary construction urged by the Government would attribute to Congress an arbitrary intention to single out non-intoxicating beer for prohibition and leave other non-intoxicating malt liquors, such as ale, stout and porter, to be freely manufactured and sold.
>
> 4. That, if the rule of *noscitur a sociis* were ever to be employed as a canon of construction, it was applicable in the present instance because of the compactness of the whole clause and the close relation of the word "other" to the descriptive or defining word "intoxicating."

These views were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit on June 26, 1919 (259 Fed. 525, 529, 541-2). Circuit Judge Ward said (at p. 529):

> "We concur in the construction of the statute by the court below."

Circuit Judge Hough described the contrary construction urged by the Government as a "strained construction" (at p. 542), and Circuit Judge Rogers declared (at pp. 541-2):

> "I am unable to see any escape from the conclusion that Congress in enacting the law had in mind *intoxicating* liquors. In that conclusion I agree with my associates.
>
> "Whether beer containing not more than 2.75 per cent. of alcohol is intoxicating is not a question of law, but one of fact, and will be determined at the final hearing upon the merits."

In *United States* v. *Standard Brewery, supra,* Judge Rose said of the act of November 21, 1918, that—

> "It is a penal law and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I cannot now say that it clearly forbids the making or sale of beer which is not intoxicating, because five of the judges of the Second Circuit have each expressed the opinion that it has no relation to anything which is not intoxicating."

In *United States* v. *Petts and Vogel*, unreported, Circuit Judge Anderson of Boston used the following language:

> "I am perfectly clear that no such strained construction should be given to this statute, which was passed for the purpose of 'conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy,' by prohibiting the use of intoxicating liquor as a beverage.

"If I were in doubt—as I am not—I should feel constrained to adopt the view of the Circuit Court of Appeals for the Second Circuit affirming the decision of the District Court. This construction has also been adopted by the District Court of Maryland.

"I may add that the serious purpose of Congress and of a large part of the voters of this country to prevent the use of intoxicating liquors as a beverage ought not to be attempted to be made ridiculous by an absurd misconstruction of this statute."

Entirely similar views were expressed by District Judge Brown of Providence in *United States* v. *The James Hanley Brewing Co.*, unreported, where he said:

"I agree with the decision of the Second Circuit Court of Appeals in considering this act as applying entirely to intoxicating liquors. Furthermore, I would find independently without regard to the decision of said court, that the War Time Prohibition Act applies only to intoxicating liquors."

In *United States* v. *Ranier Brewing Co. et al.*, 259 Fed. 359, 360, District Judge Sawtelle at San Francisco independently re-examined the question and summarized his conclusions thereon as follows:

"To further aid in carrying out the declared purpose of the act, namely, 'to conserve the man-power of the nation and to increase efficiency,' as aforesaid, it was provided in said act that after May 1st, 1919, 'and until after the termination of demobilization, . . . no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes.' It was further provided in the act—and it is this provision that defendants herein are charged with having violated—that 'after June 30th, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United

States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.' Keeping in view the purpose of the act, Congress added this provision: 'After the approval of this act, no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization.' The word 'beer' is omitted from this provision and the word 'malt' is substituted therefor. I think Congress was not interested in providing against the importation of malt liquors containing, we shall say, one-fourth of one per cent. of alcohol, but against the importation of intoxicating liquors. Manifestly, the words 'other intoxicating liquors' relate to and qualify the preceding word 'malt,' so that only intoxicating malt liquors were within the statute.

"After a careful analysis of the statute under which this prosecution has been brought, I have concluded that the words 'or other intoxicating malt or vinous liquors' qualify the preceding words 'beer' and 'wine,' and that it is not unlawful to sell beer which is not intoxicating. Therefore to bring beer within the prohibition of the act the information should allege that it was intoxicating."

District Judge Bledsoe of Los Angeles gave "the matter the benefit of [his] own independent judgment" in *United States* v. *Baumgartner*, 259 Fed. 722, and reached the same result. He said (at p. 724):

"I think from a careful reading of the statute it was the intention of Congress that the sale of intoxicating beer only should be prohibited. True it is, in words, the inhibition was laid against beer and wine, with no qualifying description; but true it is also that that was done within the limits of the same sentence, and in immediate proximity to language, which proclaimed an inhibition against 'all other intoxicating malt or vinous liquor.' It is both necessary and permissible here to use two well established rules of statutory construction. First, the doctrine of 'noscitur a

which means that 'the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it' (29 Cyc. 1065); and also the doctrine of 'ejusdem generis,' which in its practical application simply means that 'general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general.' 3 Words & Phrases Judicially Defined, p. 2328. . . . Employing these aids to construction, I am persuaded that the words beer and wine, as used in the statute, were intended by Congress to be qualified and explained by the words immediately following, and that they were intended to include only beer or wine which was in fact intoxicating. It is a familiar rule that 'a thing which is within the intention of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.' *Insurance Co.* v. *Gridley*, 100 U. S. 614, 615.

"The government contends, however, that irrespective of subsequent expressions, the use of the unmodified phrase 'beer,' makes the sale of 'beer,' whatever its alcoholic content or intoxicating effect, under the statute, unlawful. If the government's contention be correct, then the clause in question should be read as if it had been enacted as follows: '. . . No beer or wine, whether intoxicating or not, shall be sold.' If Congress had said this, though, it would have followed it up by saying that in addition, 'no other malt or vinous liquors, whether intoxicating or not, shall be sold.' But this last it did not say, but did say that no other 'intoxicating' malt or vinous liquor should be sold. It cannot reasonably be contemplated, in my judgment, that Congress for any cause, conservation of man power, increase of efficiency, or conservation of foodstuffs, intended to prohibit the sale of non-intoxicating wine and beer, and yet intended to permit the sale of other non-intoxicating malt and vinous liquors. Congress surely

intended to be sensible and consistent. This could be accomplished only by the inhibition being laid upon all the non-intoxicating liquors included within the terms malt and vinous liquors, or by the inhibition being laid only on the intoxicants included therein. The former, Congress did not do, because the statute expressly inveighs against nothing but 'intoxicating malt and vinous liquors.' It therefore permits, because not otherwise contrary to law, the sale of non-intoxicating malt and vinous liquors. It did not therefore intend, in my judgment, to prohibit the sale of non-intoxicating beer or wine, if there be such commodities. This view is arrived at by a process of thought made use of by Judge Deady of the Oregon district, in a strikingly similar situation, in *United States* v. *Loftis*, 12 Fed. 671, 673. 'The general phrase with which the enumeration ends . . . impliedly asserts that the things before enumerated' are to be of an intoxicating character.

"This conclusion, I think, is fortified by a recapitulation of the inhibitions prescribed by Congress for the war-time period. By the act of August 10, 1917, the substantial features of which were kept in effect by the act of November 21, 1918, it was provided that after September 10, 1917, no foods, fruits, etc., should be used in the production of distilled spirits. It was likewise provided that after that date no distilled spirits should be imported into the United States. 'All spirituous liquor is intoxicating.' 23 Cyc. 59. By the later act, arraying the matters mentioned consecutively in point of time, it was directed that after November 21st, the President, in defined industrial zones, at his discretion, because of the pressing necessity therefor, might prohibit the sale, manufacture, or distribution of 'intoxicating liquors.' After November 21st, no distilled, malt, vinous, or other intoxicating liquors were to be imported. After May 1st, no grains, cereals, fruits, etc., should be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor. After June 30th, no distilled spirits were to be sold, and also after June 30th, no beer, wine, or other intoxicating malt or

vinous liquors were to be sold. Throughout the whole course of this legislative history upon this particular subject, as thus portrayed, the idea is ever present that Congress was intending to place a restraint upon either the manufacture, the importation, or the sale of *intoxicating liquors*. In no way in which these provisions may be read, taken altogether, does it appear at any time that Congress was intending to place an embargo upon either the manufacture, sale, or importation of anything which was in fact non-intoxicating, and therefore not destructive in its effect upon the individual consumer thereof.

"This view is made materially manifest, in my judgment, by a consideration of the additional fact, above adverted to, that in the presence of the greatest necessity which Congress had in mind, and in which the embargo was to be laid only at the discretion of the President, to wit, in connection with the establishment of zones about highly necessary industrial activities, in that particular and important instance, where even the manufacture itself of the commodity was expressly forbidden, the prohibition decreed extended only to intoxicating liquors, and did not include non-intoxicants.

"My conclusion is that the act in question attempts and intends to prohibit the sale of intoxicants only, whether beer or wine or other beverage. By that term must be understood 'any liquor intended for use as a beverage, or capable of being so used, which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink.' 23 Cyc. 57."

In *United States* v. *Mohr*, unreported, District Judge Sanborn of Madison, Wis., spoke as follows:

"I think the plain purpose of Congress in the Act of 1918 was to conserve the man power of the nation by preventing intoxication or drunkenness and that the word 'beer' in the statute means only such beer as is actually intoxicating. I am satisfied that the better reasoning is that used by the judges of the second circuit in New York."

This ruling is all the more noteworthy since, in making it, Judge Sanborn refused to follow the contrary opinion expressed by Circuit Judge Page of Chicago in *United States* v. *Stenson Brewing Co.* (decided July 25, 1919, N. D. Ill.), a decision of a judge sitting in the same circuit with him, because, as Judge Sanborn declared, "the better reasoning is that used by the judges of the second circuit in New York." It is also noteworthy that Judge Sanborn did not view the purpose of the act as Judge Page did. The latter believed that it was intended to conserve the man power of the nation, not "by preventing intoxication or drunkenness," as Judge Sanborn declared, but by compelling the individuals engaged in the businesses affected to seek other employment. In this respect, too, Judge Sanborn, it is submitted, was in the right. It will be recalled that immediately after the signing of the Armistice all the efforts which the Government had theretofore been making to force individuals of draft age out of non-essential employments were abandoned. It was recognized that the practical termination of the war would necessarily bring about considerable unemployment, and, of course, the Government felt it to be its duty, in the administration of the draft laws, not to aggravate the unemployment situation. Judge Page's view, however, is in direct opposition to this wise policy. It is hardly conceivable that Congress, acting after the Armistice and on November 21, 1918, had any such purpose as he ascribed to it.

District Judge Geiger of the Eastern District of Wisconsin in *United States* v. *Valentine Blatz Brewing Co.*, decided at Milwaukee October 14, 1919, unreported, also

refused to follow the ruling of Judge Page in the same circuit, and quashed an indictment because it failed to charge that the beer manufactured by the defendant was intoxicating. He wrote no formal opinion, but his oral comments plainly indicated that he adopted the views herein contended for.

A recent ruling upon the subject is that of Judge Hamilton of Porto Rico in *United States* v. *Porto Rico Brewing Co.* His discussion of the question reads as follows:

> "The exact question to be determined is whether . . . the words 'beer, wine' are absolute in their meaning or whether they are to be construed in connection with the immediately succeeding words 'or other intoxicating malt or vinous liquors.' The point has received great consideration, particularly in the opinion filed May 17, 1919, by Judge A. N. Hand in the case of *Hoffmann Brewing Co.* v. *McElligott, Internal Revenue Collector*, in the District of New York; afterwards affirmed by the Circuit Court of Appeals June 26, 1919. These cases are not in all points the same with the one at bar, because they arise on the civil side of the court, in suits in equity to enjoin officials from enforcing the law in question against certain brewing companies, while the case at bar is on demurrer to a criminal information. The question as to the construction of the same statute must be the same, however, and the conclusion there reached must be the conclusion reached from any critical point of view. It is quite true that in *Holy Trinity Church* v. *United States*, 143 U. S. 457, the Supreme Court construed a statute to mean something which did not appear upon the surface and declared that courts have the right to disregard useless wording when, as surplusage, it interferes with the true object of a statute. This principle, however, does not apply in the case at bar. The Eighteenth Amendment declaring prohibition in the United States does not go into effect until January, 1920, and cannot now be taken into account. Social

or political questions or desires cannot be taken into account by a court. A court is to construe a statute as it finds it, not as it could have been made or even as it ought to have been made. These are questions for the legislature and not for the court.

"A general phrase assembling, so to speak, the preceding individual phrases is to be construed as determining the general meaning. When St. Paul speaks of 'neither life nor death nor principalities nor powers nor any other creature,' he is to be construed as thinking of these different things and considering them under the class of creatures. The law forbidding the mailing of 'books, pamphlets, pictures, papers, writings, prints or other publications of an indecent character' implied that the things first enumerated were also publications. *United States* v. *Loftis*, 12 F. 671. This has indeed been declared by the United States Supreme Court to be a well defined rule of construction, *United States* v. *Chase*, 135 U. S. 255, 258 (Lamar, J.), as was recognized by Congress when after the *Chase* case it amended the act to embrace letters which were not publications. *Andrews* v. *United States*, 162 U. S. 420; *United States* v. *Cohn*, 52 S. W. 39.

"The Selective Service Law of May 18, 1917, 40 Statutes at Large, p. 76, forbade the sale of intoxicating liquors at military reservations. The Food Control Act of August 10, 1917, 41 Stat. at Large, pp. 27, 61, referred to in the act now in question, and to be taken therefore *in pari materia*, forbids the use of food materials for the production of distilled spirits for beverage purposes, and distilled spirits might otherwise be expressed for present purposes as intoxicating liquors. The legislative history (*Blake* v. *National Banks*, 23 Wall. 317, 319) of the prohibition rider now under discussion seems to show that amendments prohibiting alcoholic beverages in general failed of enactment and the present provision which uses the word 'intoxicating' was substituted.

"Upon the whole, therefore, there seems to be no other reasonable construction of the present statute

than that the words 'other intoxicating' show that the previous words 'beer' and 'wine' must be interpreted as being also 'intoxicating.' "

It would extend this brief to an undue length to criticize in detail the opinions of the few district courts which in any wise sustain the contentions of the Government. They must, however, be briefly noticed and without repetition of the matters already considered, which, in fact, dispose of all of them.

In *United States* v. *Pittsburgh Brewing Co.*, unreported, decided July 15, 1919, W. D. Pa., District Judge Thomson laid great stress upon the ruling of the Commissioner of Internal Revenue of February 6, 1919, which he mistakenly believed to have been made "prior to the passage of the act" of November 21, 1918, and which ruling, as has been above pointed out, was quite void, and conceded so to be by the Government in the New York cases. His only other reason for his holding was that he believed the act in question to be analogous to an act prohibiting "the manufacture and sale of opium, morphine sulphate, and other poisonous narcotic drugs." The analogy is, however, inapt. All opium and morphine sulphates are poisonous and narcotic, but all beer and wine is not intoxicating. There is, therefore, in the act of November 21, 1918, opportunity for the phrase "other intoxicating malt or vinous liquor" to operate selectively upon the expressions "beer" and "wine" and apply only to the intoxicating varieties thereof, while there is no such opportunity for selective action in the illustration given by Judge Thomson. A true parallel to Judge Thomson's illustration would be: "Whisky, gin, or other intoxicat-

ing liquor," but that is wholly different from the statute in suit herein. It should, furthermore, be borne in mind that Judge Thomson's opinion did not even attempt to reconcile itself with the controlling rulings of this court in the *Chase* case, 135 U. S. 255, and the *United Verde Copper Co.* case, 196 U. S. 207.

It is unnecessary to examine at any length the reasoning of District Judge Dickinson in *United States* v. *Bergner & Engel Brewing Co.*, unreported, opinion rendered July 17, 1919, E. D. Pa. He refused either to sustain or overrule the defendant's demurrer, and declared the question of statutory interpretation to be one for determination upon the trial. He has recently explained his position in open court, stating that he did not in the opinion above mentioned intend to pass upon the construction of the act of November 21, 1918, that he would decide that question at the trial, and that he would expect the United States attorney to be ready to prove that the beer there in question was intoxicating, if he should then conclude that the act banned only actually intoxicating beer.

District Judge Rose in *United States* v. *Standard Brewery*, decided July 1, 1919, D. Md., sustained a demurrer to an indictment. It is true, he indicated a doubt as to the correctness of his ruling. He seemed to think that Congress had intended to reach all *fermented* liquors because these had theretofore been subjected to taxation. But he expressly admitted that "Congress has not used those words. It has used others which may mean that it intended to forbid the making and sale of nothing which is not intoxicating." He

should also have observed that, under any construction, Congress had prohibited only "intoxicating malt or vinous liquor," which plainly excluded many fermented beverages if they were not in fact intoxicating. His further observation that the history of the act and its contemporaneous interpretation by Congress give some support to the contention of the Government, is plainly untenable in view of what has been adduced upon those points above.

In *United States* v. *Schmauder*, 258 Fed. 251 (D. Conn.), District Judge Chatfield referred to the ruling of the Circuit Court of Appeals made during the preceding month in the *Hoffmann Brewing Co. case*, 259 Fed. 525, 529, 541-2, in so far as it construed the act of November 21, 1918, as "*dictum* on the part of the court" (258 Fed. at p. 254); but in that he was plainly wrong. In that case the Department of Internal Revenue was charged with having erroneously interpreted the act of November 21, 1918, and, consequently, with having directed the defendant Collector of Internal Revenue to act illegally, in charging him with the duty to cause this enactment, as thus misconstrued, to be enforced against the complainant and other brewers similarly situated. An injunction restraining the Collector from causing the complainant to be prosecuted under this erroneous interpretation was granted by the district court and affirmed by the Circuit Court of Appeals. In reaching this part of its decision it was, therefore, necessary for the court to decide what was the proper construction of the act. That question was raised by the pleadings, fully argued in both courts and deliberately determined. It was, therefore, obviously not

mere *dictum*. Even if the Circuit Court of Appeals had seen fit to dispose of the case on other grounds, nevertheless, since the point was presented, argued and passed upon, the pronouncement of the court thereon would, under the settled rule, have been, not *dictum*, but authoritative decision. *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143; *Union Pac. Co.* v. *Mason City Co.*, 199 U. S. 160, 166; *United States* v. *Chamberlin*, 219 U. S. 250, 262.

It was, therefore, surprising that Judge Chatfield, sitting in an inferior court in the Second Circuit, did not follow the plain decision of the Circuit Court of Appeals of that circuit. However, it is not clear from his opinion that he intended to disregard the ruling of the higher court, for he said (258 Fed. at p. 256):

> "If on a trial on the merits it should appear that the lager beer in question is not of an intoxicating nature, and is not what Congress evidently meant to prohibit, the matter can be disposed of as a question of fact."

But he added:

> "Under the Internal Revenue laws and all standards by which Congress could have viewed the matter, the beer described in the present information was of the class known as intoxicating liquor, and as such its sale was prohibited."

This assertion was unfounded. As has been shown, the internal revenue laws have not defined what is intoxicating beer or intoxicating liquor; and even if they had, the act of November 21, 1918, did not incorporate into itself any such definition. If the court meant that, because the information charged a sale of "*lager* beer," it would presume the beverage to be intoxicating, the decision is no precedent in the case at bar because the liquor

a suit is not described as lager beer in the indictment, but only as half per cent. beer. But even the correctness of any such presumption is very doubtful. *Blatz* v. *Rohrbach*, 116 N. Y. 450, 455.

The opinion of Judge Page in *United States* v. *Stenson Brewing Co.*, decided July 25, 1919, N. D. Ill., unreported, is too long for detailed review here and is, indeed, disposed of in what has already been written. It should be pointed out that District Judges Sanborn and Geiger, sitting in the same circuit, have refused to follow it in subsequent cases. Judge Page like Judge Thomson was led into error by misconception of the scope and effect of the rulings of the Department of Internal Revenue, and by giving force to the wholly unauthorized ruling of the department dated February 6, 1919, attempting to interpret the act of November 21, 1918, which ruling the Government has conceded to be void and has repudiated in the New York cases.

Judge Page, moreover, completely failed to appreciate the force and effect of such authorities as *United States* v. *Chase*, 135 U. S. 255, and *United States* v. *United Verde Copper Co.*, 196 U. S. 207.

A careful perusal and comparison of the opinions rendered interpreting the act in suit will disclose that, not only the weight of authority, but the decided weight of reasoning, is on the side of the defendant-in-error.

VII.

THE TERMS "BEER" AND "INTOXICATING" IN THE ACT OF CONGRESS OF NOVEMBER 21, 1918, CONSIDERED AND DEFINED.

In the briefs submitted on behalf of the Government in the *Ruppert* and *Standard Brewery* cases, Nos. 603 and 458, it has been suggested that Congress and the Internal Revenue Department have fixed an artificial meaning upon the terms "beer" and "intoxicating" and that this definition, although not even referred to in the act of November 21, 1918, must, nevertheless, be affixed to its language. But, as has already been sufficiently pointed out above, neither Congress nor the Internal Revenue Department has ever defined what is "beer" or what constitutes an "intoxicating liquor"; indeed, the department has never had occasion to determine anything more than what constitutes a "fermented liquor," and has expressly and distinctly declined to say what renders any beverage intoxicating, that being a matter with which it has heretofore had no concern whatever. Nor has any other department of the Government undertaken to decide that question in so far as it concerns the ordinary citizen. In fact, the Post Office Department (Liquor Bulletin No. 2, June 15, 1917) has ruled as follows under the provision of the Reed Amendment (act of March 3, 1917, 39 Stat. 1058, ch. 162) making certain written matter relating to intoxicating liquors non-mailable:

> "Since the passage of the act the department has received many requests from manufacturers, dealers, publishers, and editors for specific rulings as to whether or not certain liquids are 'intoxicating liquors' within the meaning of the act.

> "The inquiries have been answered in each case by the statement that what is or what is not 'intoxicating liquor' within the meaning of the act is a question of fact to be determined from all available evidence."

In a brief submitted by the Government to this court in the case of *United States* v. *Standard Brewery, Incorporated*, it is asserted in one place (p. 11) that—

> "Beer usually is admittedly an intoxicating beverage and is so classed in the public mind,"

while in another place (p. 17) the following appears—

> "Words used in a statute must be given their usual and ordinary meaning unless a contrary intention is expressed. No such intention having been expressed, the question is, What is the usual and ordinary meaning of the word 'beer'? All the dictionaries define it as an *alcoholic* beverage obtained by the fermentation of malt or certain other substances. . . . But the word 'intoxicating' appears in no definition. *In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage.*"

It is then argued by the Government that the "common acceptation" is not to be placed upon the language of the act in suit. But it is well settled that criminal statutes, whose prohibitions are, of course, directed to the public generally and intended to guide and deter the plain man, speak the language of the common people. The ordinary meaning must, therefore, be given the common terms employed in the act. So this court expressly held in *Sarlls* v. *United States*, 152 U. S. 570, 574.

It is further argued in the brief referred to (p. 10) that—

> "The word 'intoxicating' can scarcely be said to have a very definite meaning,"

and hence it is asserted that the word "intoxicating" in the statute should be read as the equivalent of "alcoholic." Of course, Congress did not employ the latter term, and if it had intended any such meaning, it could easily have used apt language. In fact, to repeat, the 65th Congress did not pass a bill (H. R. 14,915) whose express purpose it was "to define intoxicating liquors" as "all liquors containing alcohol." The term "intoxicating" has been employed in its ordinary significance in innumerable statutes and in the Eighteenth Amendment to the Constitution itself. Men in ordinary life have no difficulty in understanding its meaning. It can be no more embarrassing to courts or juries to decide whether a liquor is intoxicating than to decide whether an act was negligent, or wilful, or fraudulent, or malicious, as a multitude of enactments require them to do. It should, furthermore, be appreciated that, even if all beer and all wine were deemed to be within the prohibition of the statute, juries would still have to say, under the plain language of the act, whether other malt and vinous liquors were intoxicating, such as, *e. g.*, ale, porter, stout, etc., and whether liquor sold in war zones fixed by the President was intoxicating. The supposed difficulty of enforcement which the Government apprehends cannot, consequently, be eradicated under any circumstances.

But contrary to the suggestion of the Government the word "intoxicating" has a well-defined meaning. A comprehensive study of the authorities, legal and lexicographical, has evolved the following definition of "intoxicating liquors" and "intoxication" or "drunkenness":

Intoxicating liquors are those liquors which are

> intended for use as, or capable of being used as, a beverage, and which contain alcohol in such proportion or per cent that when consumed in the quantity which may practically be drunk by an ordinary man, or in any quantity which the human stomach will ordinarily hold, will produce a condition commonly known as intoxication or drunkenness. Drunkenness or intoxication is a materially abnormal mental or physical condition, manifesting itself in the loss of the ordinary control of the mental faculties or bodily functions to an appreciable or material extent.

Some of the elements of this definition are axiomatic. Thus, of course, a liquor to be intoxicating must be a beverage or capable of use as such. And equally clearly it must contain alcohol to some extent. How much alcohol is peculiarly a question of fact. In the *Intoxicating Liquor Cases*, 25 Kan. 751, 768, Judge Brewer (late of this court) said:

> "The courts cannot say, as a matter of law, that the presence of a certain per cent of alcohol brings the compound within the prohibition."

In *Board of Commissioners* v. *Taylor*, 21 N. Y. 173, 179, the court expressed the following conclusion:

> "It seems to me that but one safe and sensible line of distinction can be drawn between the different kinds of liquor containing alcohol, in order to determine upon which of them the statute was intended to operate; and that is, between those which are capable of causing intoxication, and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect; as is said to be the case with respect to spruce beer, ginger beer, lager beer and some others."

In *State* v. *Piche*, 98 Me. 348, 351, the court said:

> "Whether such liquors are intoxicating, is a question of fact to be proved by any competent evidence, the same as any other question of fact, and the force and effect of such evidence are for the jury to deter-

> mine. The composition and character of the liquor, the amount of alcohol it contains, and in what quantities it will produce intoxication, are all competent evidence tending to determine the question. The court cannot say as a matter of law that a liquor which contains three per cent or more of alcohol, is intoxicating, and that one which contains a less percentage is not; but in every case this question must be determined by the jury, from all the evidence before them."

And in *Commonwealth* v. *Blos*, 116 Mass. 56, 58, the following language was used in reference to "Schenck Beer," which was claimed to contain from five to five and one-half per cent of alcohol:

> "The apparent purpose of the statute is to provide that distilled spirits, and all liquors with which distilled spirits are mixed, and also all the liquors included by name in the specific enumeration above quoted, shall be conclusively deemed intoxicating, and the question whether they are intoxicating in fact shall not be raised at the trial. But with regard to all other liquors, this question is one to be determined by the jury upon the evidence, like any other question of fact. . . .
>
> "The fact that alcohol was discovered in it upon a chemical analysis, although undoubtedly competent evidence, does not necessarily prove that the liquor was spirituous, within the meaning of the statute. . . . The question whether it was an intoxicating liquor or not should have been submitted to the jury."

See also: *State* v. *May*, 34 Pac. 407 (Kan.); *Estes* v. *State*, 166 Pac. 77 (Okl.); *Marks* v. *State*, 159 Ala. 71; *State* v. *Virgo*, 14 N. Dak. 293.

The quantity of the liquor under inquiry which must be consumed in order to determine whether it is intoxicating or not, has been generally expressed in one of two ways, namely, (1) such quantity as may be practically drunk

by the ordinary man, and (2) such quantity as the stomach will ordinarily hold. Both of these measures are incorporated in the above definition. The court will find the first delimitation stated in the following authorities: Black's Law Dictionary (2nd ed.); Black on Intoxicating Liquors, sec. 2; 23 Cyc. 57; *Marks* v. *State*, 159 Ala. 71, 81; *Decker* v. *State*, 39 Tex. Crim. 20; *Mason* v. *State*, 1 Ga. App. 534; *Taylor* v. *State*, 49 S. W. 589; *United States* v. *Baumgartner*, 259 Fed. 722, 726; and the second in the following: *Board of Commissioners* v. *Taylor*, 21 N. Y. 173, 179; *People* v. *Zeiger*, 6 Park Crim. 355; *Blatz* v. *Rohrbach*, 116 N. Y. 450, 455; *James* v. *State*, 49 Tex. Crim. 334.

These groups of decisions clearly imply that it is the drinking capacity of the *ordinary man* which is the test, and not the drinking capacity of any extreme type of individual or one with idiosyncracies. Thus, the first group of cases lays the emphasis upon the quantity which "may be practically drunk," while the second emphasizes the quantity which "the human stomach" can ordinarily contain. It is to be observed that the test is nowhere stated to be that minimum of the liquor which *any individual* can drink or *any* human stomach hold. As is usual in the law, the ordinary person under ordinary circumstances constitutes the standard or norm to be adopted. The slightest reflection must reveal that that is, indeed, the conception which is commonly intended when we speak of "intoxicating liquors" in everyday life. Otherwise there could be no common standard or mutual understanding between men when they employed these terms. In *Heintz* v. *Le Page*, 100 Me. 542, 545, and Joyce on In-

toxicating Liquors (sec. 3), the "ordinary person" is referred to in defining the term "intoxicating liquor." Such liquor is declared to be one "that may be drank by the ordinary person as a beverage, and in such quantities as to produce intoxication." See also 1 Woolen & Thornton on Intoxicating Liquors, sec. 6, p. 13.

The suggestion heretofore made by the Government that the intoxicating quality of a liquor is to be determined, not by the ordinary person, but by some other, as "any possible user" is not only indefinite, but results in making the act of November 21, 1918, a criminal statute, either a snare and a pitfall or else meaningless. It is surely conceivable that somewhere there may be found an individual, so neurotic and weakened or so idiosyncratic, that a spoonful of any fermented liquor or a cup of grape juice, coffee, or other harmless substance, would work extraordinary, and perhaps highly deleterious, effects upon him. But what reasonable being would assert on that account that grape juice, coffee, or other substance, was poisonous or intoxicating? Under the Government's view, Congress and the President meant and accomplished nothing of any practical value, when in the act of November 21, 1918, and in the various presidential proclamations under the act of August 10, 1917, respectively, they forbade only *intoxicating liquors*. An individual who made or sold a liquor which he and his customers and neighbors in good faith believed to be absolutely non-intoxicating, and which their united experience therewith had uniformly shown to be non-intoxicating, might, nevertheless, if the Government's theory be the law, be convicted of a crime, if some degenerate or weakling could be

produced who had been affected by the beverage. The outcome is as absurd as it would be unjust, and it is submitted that no court will adopt as law the rule which would produce it.

Quite obviously an intoxicating liquor must be one that will produce intoxication or drunkenness. It must, therefore, produce a substantially altered and abnormal condition in the drinker and not merely stimulate or influence him slightly; otherwise coffee and tea, grape juice and innumerable other non-intoxicants, would have to be classified as intoxicating liquors, because they, too, upon occasion can produce distinct, stimulating, refreshing, or other observable effects. In the Standard Dictionary "drunk" is defined as "being under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties." In Bouvier's Law Dictionary it is said that "the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations," and in Black's Law Dictionary (2nd ed.) it is declared that—

> "A person is 'drunk' when he is so far under the influence of liquor that his passions are visibly excited or his judgment impaired, or when his brain is so far affected by potations of liquor that his intelligence, sense-perceptions, judgment, continuity of thought or of ideas, speech, and co-ordination of volition with muscular action (or some of these faculties or processes) are impaired or not under normal control."

See also *Sapp* v. *State*, 116 Ga. 182; *Lafler* v. *Fisher*, 121 Mich. 60; *St. Louis, I. M. & S. Ry. Co.* v. *Waters*, 152 S. W. 137 (Ark); *Gard* v. *State*, 15 Oh. C. C. (n. s.) 255; *O'Connell* v. *State*, 5 Ga. App. 234; *O'Donnell* v. *Com-*

monwealth, 108 Va. 882; *State* v. *Pierce*, 65 Iowa 85; *Wadsworth* v. *Dunnam*, 98 Ala. 610; *Columbia L. Ins. Co.* v. *Tousey*, 152 Ky. 447; *State* v. *Nethken*, 60 W. Va. 673; Webster's International Dictionary.

It should be further pointed out that the word "intoxicating," as used in the act of November 21, 1918, and in the foregoing authorities, is not employed in the peculiar and scientific sense in which medical men sometimes use it as denoting *intoxico* or poison. The physical and mental condition termed "intoxication" in ordinary speech has little, if anything, in common with the pathological condition which physicians describe, *e. g.*, by the appellation "auto-intoxication," which may exist without imbibing any alcohol at all. These various usages of the term in question should not be confused.

VIII.

As to the jurisdiction of this court.

Counsel deem it their duty to call the court's attention to the fact that the record in the case at bar fails to disclose affirmatively that the action of the court below in sustaining the demurrer to the indictment was based upon the construction of the act of Congress of November 21, 1918, rather than upon considerations of general criminal law affecting the sufficiency of the indictment. If that be so, the cases of *United States* v. *Carter*, 231 U. S. 492, and *United States* v. *Moist*, 231 U. S. 701, would compel the dismissal of the writ of error. Counsel believe it fit and proper to add that the court below in fact sustained the

demurrer because it construed the statute in question as prohibiting only intoxicating beer, and that it is earnestly urged that the general importance of the question will warrant an authoritative decision on the merits.

CONCLUSION.

For the foregoing reasons it is submitted that by the true interpretation of the act of Congress of November 21, 1918, the prohibition in question applies only to intoxicating beer, and that, therefore, the judgment below was right and should be affirmed.

New York, December 5, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel for defendant-in-error.

APPENDIX.

Proclamations and Messages of the Prseident.

Proclamation and executive order of December 8, 1917, limiting alcoholic content of malt liquors, viz.:

> "Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved by the President on August 10, 1917, it is provided in section 15, among other things, as follows:
>
> 'Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of foods, or that the national security and defense will be subserved thereby, he is authorized, from time to time to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time, prescribed in such notice, use any foods, fruits, food materials, or feeds in the pro-

duction of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.'

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers, conferred on me by said Act of Congress, do hereby find and determine that the national security and defense will be subserved by the limitation of the amount of foods, fruits, food materials, and feeds used in the production of malt liquor, and by reduction of the alcoholic content of malt liquor produced in the United States. And by this proclamation I prescribe and give public notice that on and after January 1, 1918, the total amount of foods, fruits, food materials, and feeds used by any person in the production of malt liquor shall not exceed seventy per cent. (70%) of the average consumption of any such foods, fruits, food materials, or feeds in the production of such malt liquor by such person during the period from January 1, 1917, to January 1, 1918, the unit of time to be fixed by regulation; and that on and after January 1, 1918, no malt liquor except ale and porter shall be produced in the United States containing more than two and three quarters per cent. (2.75%) of alcohol by weight.

"No person shall, after January 1, 1918, use any foods, fruits, food materials, or feeds

in the production of malt liquor, unless he secures a license so to do, to be issued by the Commissioner of Internal Revenue, and complies with rules and regulations to be hereafter promulgated governing the production of such liquor and the alcoholic content; and no person shall import any such liquor except under license to be issued by the Division of Customs, Treasury Department, and in compliance with any rules and regulations governing the importation of such liquors which may be promulgated."

PROCLAMATION AND EXECUTIVE ORDER of September 16, 1918, prohibiting manufacture of malt liquors, viz.:

"Whereas, under and by virtue of an act of Congress, entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved by the President on August 10, 1917, it is provided in Section 15, among other things, as follows:

'Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved

thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.'

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said Act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on

and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.

"In Witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done in the District of Columbia, this 16th day of September in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:

ROBERT LANSING,

Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of January 30, 1919, modifying proclamation of September 16, 1918, so as to permit the manufacture of beverages which are not intoxicating, viz.:

"Whereas, under and by virtue of an Act of Congress entitled 'An Act to Provide fur-

ther for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President, on the 16th day of September, 1918, made the following proclamation:

'Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glu-

cose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

"Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this thirtieth day of January in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of March 4th, 1919, further modifying proclamation of September 16th, 1918, so as to declare that "there is now an abundant supply" of food products, and limiting prohibition of food used in the produc-

tion of intoxicating malt liquors for beverage purposes, viz.:

"Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President on the 16th day of September, 1918, made a proclamation containing the following prohibition:

'I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And, whereas, the President, under authority of the said act of August 10, 1917, by further proclamation dated January 30, 1919, modified the said proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, such proclamation providing as follows:

'Whereas the prohibition of the use of

grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

'Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.'

"And whereas, for the production from a cereal base, of a non-intoxicating beverage, which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, but of which the use for such purposes is prohibited by the aforesaid proclamation of September 16, 1918, are required:

"Now, therefore, I, Woodrow Wilson, President of the United States, do hereby amend the aforesaid proclamation of September 16, 1918, by inserting in the first sentence of the prohibiting paragraph, after the words 'production of' the word 'intoxicating' and by striking out of the same sentence the words 'including near beer'; and by inserting in the succeeding sentence in both places where the phrase 'production of malt liquors' occurs, after the words 'production of' the word 'intoxicating,' and striking out the phrases 'including near beer' and 'whether or not such malt liquors contain alcohol' in both places in that sentence where these phrases occur, so that as amended the prohibitory

provisions of said proclamation shall read as follows:

'That the use of sugar, glucose, corn, rice or any other foods, fruits, food materials and feeds in the production of intoxicating malt liquors for beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, except hops and malt now already made in the production of intoxicating malt liquors for beverage purposes, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of intoxicating malt liquors for beverage purposes, whether or not such malt liquors contain alcohol.'

and the aforesaid Proclamation of September 16, 1918, as thus amended, shall remain in full force and effect.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this 4th day of March in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred and Forty-third.

(Signed) Woodrow Wilson.

Frank L. Polk,

Acting Secretary of State."

EXTRACT FROM PRESIDENT'S MESSAGE TO CONGRESS ON May 20, 1919.

"The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers, but I am advised that without further legislation I have not the legal authority to remove the present restrictions. I therefore recommend that the act approved November 21, 1918, entitled 'An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June 30, 1919, the purpose of the act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes' be amended or repealed in so far as it applies to wines and beers."

VETO MESSAGE BY THE PRESIDENT OF THE UNITED STATES, October 27, 1919.

TO THE HOUSE OF REPRESENTATIVES:

I am returning, without my signature, H. R. 6810, "an act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

The subject matter treated in this measure deals with two distinct phases of the prohibition

legislation. One part of the act under consideration seeks to enforce wartime prohibition. The other provides for the enforcement which was made necessary by the adoption of the constitutional amendment. I object to and cannot approve that part of this legislation with reference to wartime prohibition.

It has to do with the enforcement of an act which was passed by reason of the emergencies of the war and whose objects have been satisfied in the demobilization of the army and navy and whose repeal I have already sought at the hands of Congress. Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal.

It will not be difficult for Congress, in considering this important matter, to separate these two questions and effectively to legislate regarding them; making the proper distinction between temporary causes which arose out of wartime emergencies and those like the constitutional amendment of prohibition which is now part of the fundamental law of the country.

In all matters having to do with the personal habits and customs of large numbers of our people we must be certain that the established processes of legal change are followed. In no other way can the salutary object sought or accomplished by great reforms of this character be made satisfactory and permanent.

Woodrow Wilson,

The White House, 27 October, 1919.

UNITED STATES *v.* STANDARD BREWERY, INCORPORATED.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

UNITED STATES *v.* AMERICAN BREWING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Nos. 458, 474. Argued December 11, 1919.—Decided January 5, 1920.

The War-Time Prohibition Act prohibits the use of grains, fruits, and other food products in the manufacture of "beer, wine, *or other intoxicating* malt or vinous liquor for beverage purposes," until the conclusion of the present war, etc. *Held*, that the word "intoxicating" qualifies the terms preceding, thus excluding from the prohibition beer which is not in fact intoxicating. P. 217.

The act sought to prevent the manufacture of intoxicating liquors because their use might interfere with the consummation of the declared purposes,—to conserve the Nation's man-power and increase efficiency in producing war materials. P. 219.

Rulings of the Treasury Department holding beer containing but one-half of one per cent. of alcohol taxable under revenue laws but not involving the consideration of intoxicating quality, *held* irrelevant in the construction of the War-Time Prohibition Act. *Id.*

The question what percentage of alcohol is enough to constitute a beverage intoxicating within the meaning of the War-Time Prohibition Act is not left by that statute to the determination of the Internal Revenue Department, and its decisions in that regard, though entitled to respect, cannot enlarge the statute so as to make conduct criminal under it. *Id.*.

A construction of an act of Congress which might render it unconstitutional is to be avoided if possible. P. 220.

Quære: Whether Congress under the war power could prohibit the manufacture and sale of non-intoxicating beverages? *Id.*

An indictment must charge each and every element of the offense. P. 220.

The court cannot say, as a matter of law, that a beverage containing not more than one-half of one per cent. of alcohol is intoxicating. *Id.*

260 Fed. Rep. 486, affirmed.

THE cases are stated in the opinion.

The Solicitor General and *Mr. Assistant Attorney General Frierson* for the United States:

This act was passed under the special war powers of Congress. Its primary purpose was the withdrawal of man-power and foodstuffs from nonessential employment and their devotion to employment necessary for the successful conduct of the war. For this Congress could prohibit the manufacture of nonintoxicating as well as intoxicating beverages. What was done was to place a ban upon certain beverages, whose well-known large production and consumption constituted a heavy drain upon both the labor and food resources of the country. Doubtless, for this reason, and also because they were regarded as injurious to man-power, needed both at home and at the front, the purpose was to class generally, as nonessential, alcoholic beverages. Accordingly, the act prohibits by name the best-known and most largely consumed beverages of this class, generally recognized as more or less intoxicating; and, to embrace other similar but less well-known beverages, there were added the general words "or other intoxicating malt or vinous liquor."

The only way to give effect to these words is to say that whatever beverages come within the commonly understood meaning of beer and wine are prohibited, and the prohibition is then extended, by general words, to other beverages which are similar to beer and wine with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities. The word

"intoxicating" can scarcely be said to have a very definite meaning. It is ordinarily defined to mean: Producing intoxication or feelings like those of intoxication; exhilarating; exciting, maddening, or stupefying with delight. (Standard Dictionary.)

But men will differ about what is exhilarating or exciting or intoxicating. Experts differ as to what per cent. of alcohol suffices to render a beverage intoxicating. It is a well-known fact that what will make one man drunk will have no effect upon another, and a drink which, at one time, may seem not to affect a man, may, at another time, make the same man drunk. A law whose enforcement depended upon the determination by juries of such a question would rest upon a most insecure foundation, and anything like a uniform administration of it would be impossible. Hence, the States in passing prohibition laws have always enumerated by name the best-known alcoholic or intoxicating liquors and added general language to include other similar beverages. Congress, in this act, has followed the same course. Beer usually is admittedly an intoxicating beverage and is so classed in the public mind, whether a particular quantity of it will make a particular man drunk or not. To say that the Government must prove in each case that the beer involved is, in fact, intoxicating would make the efficient enforcement almost if not quite impossible.

Under the rule *ejusdem generis* the meaning of general words may take color from the words used in the enumeration which they follow. But there is no rule under which words of a specific meaning used in an enumeration are to be given a different meaning by reason of general language following them and intended to describe other articles or persons. The rule in question leads to the conclusion that any malt or vinous liquor which is intoxicating in the sense that beer and wine are intoxicating is prohibited; but it can not be so applied

as to exclude any beverage which would ordinarily be included under the word "beer." The intention was to prohibit all beverages which are commonly known as beer. The courts of the various States have almost uniformly given this construction to similar language. *United States* v. *Cohn*, 2 Ind. Terr. 474, 492, 501; *State* v. *Ely*, 22 S. Dak. 487, 492–493; *La Follette* v. *Murray*, 81 Ohio St. 474; *Fuller* v. *Jackson*, 97 Mississippi, 237, 253–256; *Extract & Tonic Co.* v. *Lynch*, 100 Mississippi, 650; *Marks* v. *State*, 159 Alabama, 71; *In re Lockman*, 18 Idaho, 465, 469; *Brown* v. *State*, 17 Arizona, 314.

In *United States* v. *Chase*, 135 U. S. 255, the general expression "writing" was given color from the specific words used in the preceding enumeration "book, pamphlet, picture, paper," which were held to imply a "publication" even without reference to the use of that word in the general language following the enumeration. When the amended statute came before the court it was not supposed that the word "publication" used in the general language modified in any way the word "letter" introduced into the specific enumeration. *Grimm* v. *United States*, 156 U. S. 604; *Andrews* v. *United States*, 162 U. S. 420. *Insurance Co.* v. *Gridley*, 100 U. S. 614, does not involve the rule *ejusdem generis*.

All the dictionaries define beer as an alcoholic beverage obtained by the fermentation of malt or certain other substances. But "intoxicating" appears in no definition. In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage. If it contains the usual ingredients of beer, including alcohol, a beverage is *beer* even though the quantity of alcohol is not sufficient to produce actual drunkenness. Nothing else appearing, it could be well said that such a beverage is beer if it contains any alcohol. But, when used by Congress, it has come to have a slightly different meaning. For years, a tax has been levied on "beer, lager beer, ale,

porter, and other similar fermented liquors." Revised Statutes, §§ 3335–3339. From the first the Internal Revenue Department has ruled that the tax applied to all such beverages containing as much as one-half of one per cent. of alcohol. Treasury Decisions 1307, 1360, 2354, 2370 and 2410. Manufacturers acquiesced and paid the tax. Such a beverage containing as much as one-half of one per cent. of alcohol has, therefore, long ago come to be recognized both by the Government and the manufacturers as beer. And Congress has continued from time to time in revenue laws to use the same language and may well be said to have adopted the meaning thus placed upon it. Finally, in the Revenue Act of 1917, passed before the act now in question, and the Revenue Act of 1918, passed later, Congress has expressly described beer as containing one-half of one per cent. or more of alcohol and classed similar beverages containing less as soft drinks. It is clear, then, that when Congress used the word "beer" in the Act of November 21, 1918, it used it in that sense.

Mr. William L. Marbury, with whom *Mr. Randolph Barton, Jr.*, and *Mr. William L. Rawls* were on the brief, for defendant in error in No. 458.

Mr. Elihu Root, with whom *Mr. William D. Guthrie* was on the brief, for defendant in error in No. 474.

Mr. Wayne B. Wheeler and *Mr. Andrew Wilson*, by leave of court, filed a brief as *amici curiæ*.

Mr. Justice Day delivered the opinion of the court.

These causes are here under the Criminal Appeals Act, March 2, 1907, c. 2564, 34 Stat. 1246, and require the construction of the so-called "War-Time Prohibition

Act," of November 21, 1918, c. 212, 40 Stat. 1045, 1046, 1047.

In No. 458 the Standard Brewery, Incorporated, was indicted for unlawfully using certain grains, cereals, fruit, and other food products on the 4th of June, 1919, in the manufacture and production of beer for beverage purposes which, it is charged, contained as much as one-half of one per cent. of alcohol by both weight and volume. In No. 474 the American Brewing Company was indicted for the like use on the 26th day of June, 1919, of certain grains, cereals and food products in the manufacture and production of beer containing a like percentage of alcohol.

In the indictment in No. 474 it was charged that at the time of the alleged offense the termination of demobilization had not been determined and proclaimed by the President.

In each case a demurrer was sustained by the District Court.

Before considering the construction of that portion of the act involved in these cases it will be helpful to give a short history of the preceding legislation that led up to it. The Food Control Act of August 10, 1917, c. 53, 40 Stat. 276, 282, authorized the President to prescribe and give public notice of limitations, regulations, or prohibitions respecting the use of foods, fruits, food materials or feed, in the production of malt or vinous liquors for beverage purposes, including regulations for the reduction of the alcoholic content of any such malt or vinous liquor, in order to assure an adequate and continuous supply of food, and promote the national security and defense. Whenever notice should be given and remain unrevoked no person, after a reasonable time prescribed in such notice, could use any food, fruits, food materials or feeds in the production of malt or vinous liquors, or import any such liquors except under license and in compliance with lawfully prescribed rules and regulations. Under the

authority thus conferred, the President issued various proclamations. On December 8, 1917, 40 Stat. 1728, he issued one forbidding the production of all malt liquor, except ale and porter, containing more than 2.75 per cent. of alcohol by weight. On September 16, 1918, 40 Stat. 1848, he issued a second proclamation, prohibiting after December 1, 1918, the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contained alcohol. On January 30, 1919, 40 Stat. 1930, he issued a third proclamation which modified the others to the extent of permitting the use of grain in the manufacture of non-intoxicating beverages, it being recited therein that the prohibition of the use of grain in the manufacture of such beverages has been found no longer essential in order to assure an adequate and continuous supply of food. And on March 4, 1919, 40 Stat. 1937, he issued a fourth proclamation amending his proclamation of September 16, 1918, so as to prohibit the production only of intoxicating malt liquors for beverage purposes.

It thus appears that the President, acting under the Act of August 10, 1917, has reduced the prohibition of the use of food materials so that now it is limited to the manufacture of such liquors as are in fact intoxicating.

In the light of all this action we come to consider the proper construction of so much of the Act of November 21, 1918, as is here involved, which provides:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for

beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export."

Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. *Lake County* v. *Rollins*, 130 U. S. 662, 670, 671; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 33; *United States* v. *Bank*, 234 U. S. 245, 258; *Caminetti* v. *United States*, 242 U. S. 470, 485. Looking to the act we find these are its declared purposes: (1) To conserve the man power of the nation; (2) to increase efficiency in the production of arms, munitions, ships, and food and clothing for the army and navy. To these ends it is made illegal to sell distilled spirits for beverage purposes or to remove the same from bond for such purposes except for export. And after May 1, 1919, until the conclusion of the war, and until demobilization is proclaimed by the President, no grains, cereals, fruit, or other food products are permitted to be used in the manufacture or production of

beer, wine or other intoxicating malt or vinous liquors for beverage purposes.

The prohibitions extend to the use of food products for making "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." These provisions are of plain import and are aimed only at intoxicating beverages. It is elementary that all of the words used in a legislative act are to be given force and meaning, *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The Government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words.

This court had occasion to deal with a question very similar in character in the case of the *United States* v. *United Verde Copper Co.*, 196 U. S. 207, where an act permitted the use of timber on the public lands for building, agricultural, mining and other domestic purposes, and held that we could not disregard the use of the word "other" notwithstanding the contention that it should be eliminated from the statute in order to ascertain the true meaning. So here, we think it clear that the framers of the statute intentionally used the phrase "other intoxicating" as relating to and defining the immediately preceding designation of beer and wine. "As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all." Lord Bramwell in *Great Western Ry. Co.* v. *Swindon, etc., Ry. Co.*, L. R. 9 App. Cas. 787, 808.

The declared purpose of Congress was to conserve the nation's man power and increase efficiency in producing war essentials; and it accordingly undertook to prohibit the manufacture of intoxicating liquors whose use might interfere with the consummation of that purpose. Other provisions of the act lend support to this view. The sale and withdrawal from bond of distilled spirits (always intoxicating) were declared unlawful after June 30th, 1919—their manufacture had already been prohibited. The sale of beer, wine and other intoxicating malt or vinous liquors was prohibited after the same date and the importation of all such liquors and also of distilled liquors was made immediately unlawful. The President was empowered at once to establish zones about coal mines, manufactories, ship-building plants, &c., &c., and "to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones."

The fact that the Treasury Department may have declared taxable under many revenue acts all beer containing one-half of one per centum of alcohol is not important. Such rulings did not turn upon the intoxicating character of the liquid but upon classification for taxation controlled by other considerations. A liquid may be designated as beer and subjected to taxation although clearly non-intoxicating. "The question whether a fermented malt liquor is intoxicating or nonintoxicating is immaterial under the internal revenue laws, although it may be a very material question under the prohibitory laws of a State or under local ordinances." T. D. 804.

As to the insistence that the Internal Revenue Department has determined that a beverage containing one-half of one per cent. of alcohol should be regarded as intoxicating within the intendment of the act before us little need be said. Nothing in the act remits the determination of that question to the decision of the revenue officers of the Government. While entitled to respect,

as such decisions are, they cannot enlarge the meaning of a statute enacted by Congress. Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. *Waite* v. *Macy*, 246 U. S. 606; *United States* v. *George*, 228 U. S. 14, 20; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215.

Furthermore, we must remember in considering an act of Congress that a construction which might render it unconstitutional is to be avoided. We said in *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. We held in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146, that the war power of Congress, as applied to the situation outlined in the opinion in that case, enabled it to prohibit the sale of intoxicating liquor for beverage purposes. But the question was neither made nor decided as to whether Congress could prohibit even in time of war the manufacture and sale of non-intoxicating beverages.

An indictment must charge each and every element of an offense. *Evans* v. *United States*, 153 U. S. 584, 587. We cannot say, as a matter of law, that a beverage containing not more than one-half of one per cent. of alcohol is intoxicating, and as neither indictment so charges it follows that the courts below in each of the cases correctly construed the act of Congress, and the judgments are

Affirmed.